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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 83

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE FRANK ROBEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court's memorandum opinion dismissing the indictment (R. 5-9) is not officially reported. The court of appeals wrote no opinion in certifying the appeal to this Court (R. 15-16).

JURISDICTION

On October 4, 1965, the district court dismissed the indictment on the ground that active and knowing membership in a Communist-action organization and

specific intent to further its unlawful purposes are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D), which appellee was charged with having violated. The government filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on November 2, 1965. On the government's unopposed motion, the court of appeals certified the appeal to this Court on February 28, 1966, and this Court noted probable jurisdiction on May 16, 1966 (R. 16; 384 U.S. 937). Jurisdiction of this Court is invoked under 18 U.S.C. 3731 because the district court's order dismissing the indictment was "based upon the * * * construction of the statute upon which the indictment * * * is founded."

QUESTIONS PRESENTED

1. Whether active membership in a Communist-action organization, knowledge of its unlawful purposes and specific intent to further them are essential elements of the offense defined in Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1)(D).

2. Whether, if the first question is answered in the negative, Section 5(a)(1)(D) is constitutional.

STATUTE INVOLVED

The Subversive Activities Control Act of 1950, 64 Stat. 987, as amended, 50 U.S.C. 781, *et seq.*, provides in pertinent part:

Sec. 3. For the purposes of this title—

* * * *

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *

* * * *

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

* * * *

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated by the Secretary of Defense pursuant to section 5(b) of this title and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

* * * *

Section 5(a). When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

* * * * *

(2) * * *

* * * * *

(b) The Secretary of Defense is authorized and directed to designate facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall promptly notify the management of any facility so designated, whereupon such management shall immediately post conspicuously notice of such

> designation in such form and in such place or places as to give notice thereof to all employees of, and to all applicants for employment in, such facility. Such posting shall be sufficient to give notice of such designation to any person subject thereto or affected thereby. Upon the request of the Secretary, the management of any facility so designated shall require each employee of the facility, or any part thereof, to sign a statement that he knows that the facility has, for the purposes of this title, been designated by the Secretary under this subsection.

The pertinent portion of 50 U.S.C. 794, the penalty provision, reads:

> (c) * * * Any individual who violates any provision of [section 5] * * * of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

STATEMENT

On May 21, 1963, appellee was charged in a one-count indictment filed in the United States District Court for the Western District of Washington with having violated Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784 (a)(1)(D). The indictment alleged (1) that a final order of the Subversive Activities Control Board directing the Communist Party of the United States of America to register as a "Communist-action organization" had been in effect since October 20, 1961; (2) that the Secretary of Defense had, on August 20,

1962, designated the Todd Shipyards Corporation in Seattle, Washington, as a defense facility under Section 5(b) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(b); (3) that from November 19, 1962 and continuously to the date of indictment appellee had "unlawfully and willfully engage[d] in employment" at the Todd Shipyards Corporation "while at the same time being a member of the Communist Party of the United States of America" and having "knowledge and notice" of both the order of the Subversive Activities Control Board and the designation of the Secretary of Defense (R. 1-2).

Appellee moved on June 5, 1963, to dismiss the indictment on constitutional and other grounds (R. 3-5). On October 4, 1965, with a memorandum opinion, the district court dismissed the indictment because it failed to allege that appellee was "an active member of the Party, or that he is acting or has acted or intends to act to further the unlawful purposes of the Party" (R. 7). The court expressed the view that if the requirements of active membership and specific intent were not "deemed implicitly in the statute" (R. 9), Section 5(a)(1)(D) would encounter constitutional difficulties. It held, therefore, that an indictment under this statute must allege, and the government must prove at trial, that "the defendant was an active or participating member of the Communist Party with knowledge of its unlawful purposes and a specific intent to advance such purposes" (R. 9). The government appealed to the Court of Appeals for the Ninth Circuit which, on the government's motion, certified the appeal to this Court (R. 10-16).

INTRODUCTION AND SUMMARY OF ARGUMENT

While recognizing that Section 5(a)(1)(D) does not "explicitly * * * provide or require" (R. 9) proof of appellee's knowledge of the Communist Party's unlawful purposes, his "active" membership in the Party, or his "specific intent" to further its unlawful objectives, the district court read these requirements into the statute to "overcome" constitutional difficulties (*ibid.*). These elements were borrowed by the district court from the membership clause of the Smith Act, 18 U.S.C. 2385, as construed by this Court in *Scales* v. *United States*, 367 U.S. 203. Our basic position is that a straightforward construction of the present statute does not raise the constitutional doubts which suggested a reading of the membership clause of the Smith Act to include the elements of active membership and specific intent.[1] And we think it plain that if ordinary principles of statutory construction, rather than those peculiarly applicable to provisions which are constitutionally dubious, are applied to Section 5(a)(1)(D), the provision cannot be read as requiring the elements which the district court prescribed in this case.

Our Argument first discusses the constitutional question because it is clear from the opinion below that the district judge felt constrained to interpret Section 5(a)(1)(D) as he did to save it from con-

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[1] The third element—knowledge of unlawful purposes—is expressly provided in the Smith Act itself. See 18 U.S.C. 2385: "Whoever * * * becomes or is a member of, or affiliates with, any such society, group or assembly of persons, knowing the purposes thereof * * *."

stitutional challenge. We argue that Section 5(a)(1)(D) is a permissible prophylactic measure designed to regulate those who have access to facilities which are essential to the national security. By prohibiting individuals who are members of Communist-action organizations from engaging in employment in defense plants, Congress was not imposing a punishment on account of membership in an organization—as a prosecution under the membership clause of the Smith Act would do. Rather, Congress was legislating to prevent substantial anticipated dangers—espionage or sabotage in defense facilities.

We recognize, of course, that Communist-action organizations may pursue lawful goals as well as unlawful ones, and that when Congress deals with the menace of Communist subversion it must be particularly cautious not to impinge upon the constitutionally protected liberties of those who adhere only to the lawful aims of such organizations. But that responsibility does not invalidate every legislative act concerning Communist activity which may conceivably reach beyond the most immediate or obvious danger. Among the elements which must be weighed in judging the propriety of a particular exercise of legislative power in this area is the gravity of the harm which Congress sought to prevent. In this case, unlike others in which provisions of the federal internal security laws have been challenged and declared unconstitutional, the potential injury is very serious. Consequently, Congress' remedy—although it might be deemed overbroad if it related to other dangers—is, in light of the seriousness of this particular risk, a

permissible exercise of "the right of self-preservation, 'the ultimate value of any society.'" *Barenblatt* v. *United States*, 360 U.S. 109, 128, quoting from *Dennis* v. *United States*, 341 U.S. 494, 509.

I

A. We argue first that Congress was exercising its war powers when it enacted Section 5(a)(1)(D) to restrict access to defense facilities. This provision was intended as part of a loyalty-security program which had been found necessary during World War II and was continued in the post-war national emergency periods. The dangers of sabotage and espionage in defense facilities were brought home to Congress in various legislative investigations. Although there were differences as to how the end could best be achieved, it was generally agreed by the President, representatives of Executive departments and Congress that greater precautions would have to be taken to insure that disloyal employees did not have access to installations on which the national defense depended. Section 5(a)(1)(D) was a response to this need, and it has been administered by the Secretary of Defense in a manner consistent with that limited purpose.

B. We then show that Congress acted reasonably when it chose these means to secure defense facilities against sabotage and espionage. The existence of criminal statutes dealing with acts of sabotage and espionage in defense plants could properly be regarded as inadequate protection for these vital facilities. There are obvious difficulties in detecting the persons guilty of espionage or sabotage, and a statute "pun-

ishing the act" rather than "remov[ing] the threat" (*American Communications Association* v. *Douds*, 339 U.S. 382, 406) may be deemed insufficient if the risk is great enough. Nor was Congress obliged to be satisfied with the "industrial security" program as it had theretofore developed. That program did not reach all facilities in which the threat of harm to the national security was presented. And pre-employment clearance is not nearly as feasible when a private employer's work force is being cleared as when government employment is involved.

Congress also acted reasonably when it concluded, in light of its findings regarding the international Communist conspiracy, that all members of a "Communist-action" group who choose to retain their membership after being notified of the group's obligation to register raise a sufficient doubt of their loyalty to warrant their disqualification from defense-facility employment. When the danger is as great as it is here, the test should not be whether disloyalty has been proved but whether there is a sufficient doubt of loyalty to warrant denial of access to defense plants. That was the standard used in the loyalty-security programs developed during and after World War II, and it was properly used as the premise for the legislation including Section 5(a)(1)(D).

We also argue that the criminal sanction was a reasonable and permissible means of implementing Congress' prohibition. The district court erred in assuming that by enacting this kind of conflict-of-interest statute, Congress was punishing membership in "Communist-action" groups.

C. We show finally that Section 5(a)(1)(D) does not violate the First Amendment because it concerns a much greater governmental interest and a lesser interference with private rights than were involved in other cases in which this Court passed upon statutes affecting members of Communist organizations. Neither *Aptheker* v. *Secretary of State*, 378 U.S. 500, nor *Scales* v. *United States*, 367 U.S. 203, supports the contention that Section 5(a)(1)(D) is unconstitutional as written.

II

A. The language and legislative history of Section 5(a)(1)(D) totally fail to provide any basis for the district court's construction of the provision as requiring allegations and proof of knowledge, active membership and specific intent. Indeed, the very same language is used in Section 5 to describe the class to which that Section's prohibitions apply as is used in Section 6, which deals with the use of passports by members of Communist organizations. In *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511, this Court refused to read the elements of active membership and specific intent into Section 6, notwithstanding the fact that the Court was consequently compelled to hold the Section unconstitutional on its face. It follows that the construction given Section 5(a)(1)(D) by the district court in this case was plainly impermissible.

B. Section 5(a)(1)(D) was designed as a prophylactic statute, to remove the threat presented by employees of defense facilities whose loyalty was in

doubt. The district court's reading of the statute limits its application to those who may be successfully prosecuted under the membership clause of the Smith Act, 18 U.S.C. 2385. It thereby deprives the provision of all its preventive effect by leaving it in force only against those whose disloyalty can be demonstrated beyond a reasonable doubt. This, we submit, is plainly contrary to the legislative purpose.

ARGUMENT

I

Section 5(a)(1)(D) is Constitutional as Written

Section 5(a)(1) of the Subversive Activities Control Act of 1950, 50 U.S.C. 784(a)(1), enumerates various prohibitions imposed by the Act upon "any member" of a Communist-action or Communist-front organization who has "knowledge or notice" of the organization's registration under the Act or of a final order of the Subversive Activities Control Board directing the organization to register. The fourth of these prohibitions—subsection (D)—is the one which appellee was charged with having violated in this case. Subsection (D) makes it unlawful for any member of a Communist-action organization "to engage in any employment in any defense facility" (p. 4, *supra*). Section 15(c) of the Act, 50 U.S.C. 794(c), imposes a maximum sentence of five years' imprisonment and a $10,000 fine for violation of the provisions of Section 5.

The one-count indictment in which appellee was charged alleged the following elements of the offense:

1. That the Communist Party of the United States of America was under a final order to register as a Communist-action organization.
2. That Todd Shipyards was designated by the Secretary of Defense as a defense facility.
3. That appellee was a member of the Communist Party of the United States of America.
4. That appellee had "knowledge and notice" of the order requiring the Communist Party to register.
5. That appellee had "knowledge and notice" of the Secretary of Defense's designation of Todd Shipyards as a defense facility.
6. That appellee "unlawfully and willfully" engaged in employment at Todd Shipyards while he had such knowledge.

These are the only elements expressly set out in the statute and they are, in our view, sufficient to establish the commission of the offense. The district court held that Section 5(a)(1)(D) could not be literally construed without making it constitutionally vulnerable. We believe, for the reasons stated below, that Congress has the constitutional power to bar, under pain of criminal sanction, a class of individuals identified by their voluntary association with a foreign-dominated conspiracy from employment in a defense facility.

The district court, we submit, arrived at the conclusion that Section 5(a)(1)(D) was constitutionally dubious because it judged the provision as if it were a punishment imposed on members of subversive organizations. That characterization—which might justify application of the principles of construction applied by this Court in *Scales* v. *United States*, 367

U.S. 203—misapprehends the purpose and effect of the legislation. A more precise examination of this provision of the 1950 statute in the context of Congress' expressed concern with the security of defense facilities demonstrates that Section 5(a)(1)(D) was designed to protect essential defense installations against sabotage and espionage. Its constitutional validity must be judged not solely by the standards applied in decisions of this Court involving legislative efforts to deal with Communist subversion and aggression in this country but by the principle applicable to Congress' exercise of the war power. We submit that, in light of those standards, Section 5(a)(1)(D) is constitutional as written.

A. *In this provision Congress exercised its broad constitutional powers to secure defense facilities against espionage and sabotage.*

In *Hirabayashi* v. *United States*, 320 U.S. 81, 93, this Court commented upon the breadth of the "war power" conferred upon Congress by Art. I, Sec. 8 of the Constitution:

> It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. * * *

See also *Lichter* v. *United States*, 334 U.S. 742, 754-772; cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144.

Section 5(a)(1)(D) is a legislative provision aimed at "the protection of war materials." By means of a criminal statute Congress has, in effect, limited the class of those who have access to military and civilian plants which produce military equipment or which provide services essential to the defense industry. Section 5(a)(1)(D) is, in short, part and parcel of the federal civilian loyalty-security program which is designed to prevent espionage and sabotage within the federal government and in defense installations. It was a natural development in 1950 of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depended. The underlying problem, however, is much older.

During World War I Congress' attention was drawn to the dangers of sabotage in facilities which, while under civilian control, were essential to the country's war effort and to its defense. The Act of April 20, 1918 (Sabotage Act), 40 Stat. 533, made it a criminal offense to destroy "any war material, war premises, or war utilities" or willfully to make any "war material" in a defective manner. See 18 U.S.C. 2153, 2154. "War premises" was defined to include privately owned facilities where "war material"—*i.e.*, any articles "intended for, adapted to, or suitable for * * * use * * * in connection with the conduct of war or defense activities"—was being produced, manufactured or stored. See 18 U.S.C. 2151. Subsequent amendments to the sabotage provisions of the Criminal Code have enlarged their scope to include "national-defense"

material, premises and utilities (18 U.S.C. 2151, 2155, 2156) and have extended the original sabotage provisions dealing with "war materials" until "six months after the termination of the national emergency proclaimed by the President on December 16, 1950 * * *." 18 U.S.C. 2157(a).

No organized loyalty-security program was in effect with respect to either government employees or those employed in privately owned defense facilities until World War II. In 1939, however, Congress passed Section 9A of the Hatch Political Activity Act, 53 Stat. 1148, which declared it to be unlawful "for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States." [2] There is no indication

[2] 5 U.S.C. 118p(2) is the current version of this provision. It provides:

> No person shall accept or hold office or employment in the Government of the United States or any agency thereof, including wholly owned government corporation, who—
>
> * * * * *
>
> (2) is a member of an organization that advocates the overthrow of our constitutional form of government in the United States, knowing that such organization so advocates.
>
> * * * * *

5 U.S.C. 118r provides that any person violating section 118p "shall be guilty of a felony, and shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both."

in the legislative history of this provision that it was aimed at saboteurs or spies, but military agencies thereafter manifested concern over the dangers of sabotage or espionage by disloyal employees.[3] Responding to this concern, Congress gave the Secretaries of War and Navy and the Coast Guard the power summarily to remove employees who were considered risks to the national security. 54 Stat. 679, 56 Stat. 1053. In addition, Congress inserted in World War II appropriations acts the proviso that "no part of this appropriation shall be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence." See, *e.g.*, the Act of February 6, 1941 (Emergency Cargo Ship Construction Act), 55 Stat. 5, 6. Violations of the proviso were punishable by fines of not more than $1,000 and imprisonment for not more than one year. 55 Stat. 6.

During World War II the War Department concluded that preventive security precautions were necessary not merely in federal employment but also with respect to those employed by private concerns which were supplying and servicing the nation's military operations. Consequently, various "industrial security" programs[4] were established and adminis-

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[3] See Bontecou, *The Federal Loyalty-Security Program* (1953), p. 12; H. Rep. No. 2261, 76th Cong., 3d Sess. (1940); 86 Cong. Rec. 7925 (1940).

[4] "Industrial security" has been defined as (1) "that portion of internal security which is concerned with the protection of classified information in the hands of United States industry," and (2) "the protection of industrial facilities

tered by affected agencies of the federal government. These programs included the assignment of increased physical protection to defense facilities and a drive for the "[d]ischarge of subversives from private plants and war department plants privately operated of importance to Army procurement." *Report of the Commission on Government Security* (1957), p. 237. Ultimately, in the postwar period, a centralized Industrial Security Program was developed by the Department of Defense (see *id.* at 238-249; *Greene* v. *McElroy*, 360 U.S. 474, 493-494), which supervised security clearances for the approximately 3,000,000 civilian employees of contractors with military departments. See Association of the Bar of the City of New York, Report of the Special Committee on the Federal Loyalty-Security Program (1956) p. 4.

It is clear from the face of Section 5(a)(1), as it was enacted in 1950, that it was related to the loyalty-security programs which were then being consolidated within the Department of Defense. Two of the four subsections of Section 5(a)(1)—subsections (A) and (C)—provided criminal penalties for a *failure to disclose* membership in a Communist organization in applications for federal employment or for defense-facility employment. These were plainly designed to make existing clearance procedures more effective. Subsection (B) of Section 5(a)(1) restated, for all practical purposes, the proscription of Section

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which are essential to support a wartime mobilization program from loss or damage by the elements, sabotage, or other dangers arising within the United States." *Report of the Commission on Government Security* (1957), p. 236.

9A of the Hatch Political Activity Act of 1939 (p. 16, supra).[5] Section 5(a)(1)(D) — which is at issue here—was based upon a determination by Congress that it was as necessary to the national security to deny to members of Communist-action organizations access to defense facilities as it was to bar them from federal employment.

Indeed, testimony before the House Un-American Activities Committee on proposed legislation which was the basis for the Subversive Activities Control Act of 1950 makes it entirely clear that the question of whether the existing loyalty program was adequate was squarely presented to Congress. One proposed bill would have imposed criminal penalties on, *inter alia*, any federal officer or employee or "any individual employed in connection with the performance of any national defense contract" who became or remained "a member of, or affiliated with, the Communist Party of the United States of America, or any organization which shall have been designated as subversive by the Attorney General." The bill—H.R. 3903, 81st Cong., 1st Sess.—was opposed by the Department of Justice on the grounds that: (1) the

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[5] Whereas the Hatch Act prohibited membership by federal employees in any organization "which advocates the overthrow of our constitutional form of government," Section 5(a)(1)(B) prohibits their membership in any registered "Communist-action organization." In light of the findings of Section 2 and the definitions of Section 3 (50 U.S.C. 781, 782), there can hardly be any doubt that any "Communist organization" within the 1950 Act would also qualify as an organization advocating overthrow within the meaning of the Hatch Act.

limitation on private citizens who are members of the Communist Party might constitute a bill of attainder,[6] (2) the bill contained no legislative findings, and (3) there was a "world of difference * * * from the standpoint of sound policy and constitutional validity, between making, as the bill would, membership in an organization designated by the Attorney General a felony, and recognizing such membership, as does the employee loyalty program under Executive Order 9835, as merely one piece of evidence pointing to possible disloyalty."[7] *Hearings on Legislation to Outlaw Certain Un-American and Subversive Activities before the House Un-American Activities Committee*, 81st Cong., 2d Sess. (1950), pp. 2122, 2124, 2125. The Department noted, in addition, that the activities of federal employees sought to be covered by the pro-

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[6] Compare *United States* v. *Brown*, 381 U.S. 437.

[7] This expression of view was quoted by this Court in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 513, n. 12. It should be noted that while membership in an organization designated by the Attorney General was, under the then outstanding Executive Order, "only * * * one factor to be weighed in determining the loyalty of an applicant or employee" (378 U.S. at 513), Section 9A of the Hatch Act made such membership conclusive if the organization advocated the "overthrow of our constitutional form of government." See p. 16, *supra*. The bill on which the Department expressed its views went beyond the standard of the Hatch Act and empowered the Attorney General to designate any organization which was "totalitarian, fascist, communist or subversive, or [had] adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or [sought] to alter the form of government of the United States by unconstitutional means."

posed bill were "restricted adequately by Section 9A of the Hatch Act" and by the then existing loyalty program. The Department's letter also expressed its belief that the Department of Defense and the Atomic Energy Commission had "adopted certain precautionary measures covering activities of employees of those holding contracts connected with the national defense." *Id.* at 2125.

Notwithstanding these views, Congress enacted a provision which went beyond the existing loyalty programs for federal employees and for employees of defense contractors. By not mentioning the Communist Party by name Congress sought to avoid the bill-of-attainder difficulty (see *United States* v. *Brown*, 381 U.S. 437; *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 86-87), and the Control Act, as passed, contained substantial legislative findings (see 50 U.S.C. 781). But Congress plainly rejected the Department's view that existing security programs were adequate to deal with espionage and sabotage by members of Communist organizations. And by defining the class of prohibited organizations much more narrowly than the proposed legislation had done and providing for a full administrative proceeding to determine the character of the organization, Congress apparently sought to meet the objection that a criminal sanction ought not to be imposed on a private citizen merely as a result of an "administrative designation" by the Attorney General (*Hearings*, *supra* at 2124).

The conclusions of the Congress which enacted the Subversive Activities Control Act in 1950 were re-

flected in the views expressed in that year's Annual Report of the House Committee on Un-American Activities, H. Rep. No. 3249, 81st Cong., 2d Sess. (1951), p. 29:

> The year 1950 has marked a new stage in the struggle against communism in the United States. The attack upon Korea makes it plain beyond all doubt that communism has passed beyond the use of subversion to conquer the independent nations and will now use armed invasion and war. With the Armed Forces of the United States actually pitted in conflict against the legions of international communism, the Communist Party of the United States can no longer be viewed passively as a group of mere political and ideological dissidents, but must be looked upon with all seriousness as a military fifth column actively aiding our enemies.
>
> Yet, today we find many of these potential fifth columnists employed in our leading defense plants, making weapons to be used against the Communist armies which they are pledged to support. To remove these persons from positions where they could sabotage our defense production there was included in the Wood-McCarran Communist-control bill a section which prohibits employment of Communist Party members in defense plants designated as such by the Secretary of Defense. The committee recommends that the Congress adopt a resolution calling upon the Secretary of Defense to immediately place in effect the provisions of section 5 of Public Law 831, Eighty-first Congress.

Congress' conclusion that the employment of members of Communist organizations in defense facilities

presented a substantial threat to the security of the nation was based upon years of legislative investigation. As early as 1941, the House Committee on Un-American Activities strongly urged "that employment in national-defense industries or the Government service be denied to any person who has been and is now active in any particular organization which is found to be under the control and guidance of a foreign government." H. Rep. No. 1, 77th Cong., 1st Sess. (1941), p. 25. This recommendation was based, in part, on investigations of the Special Committee on Un-American Activities (known as the Dies Committee) which began in 1938 to inquire into subversion in government and in essential defense industries. A "Special Report on Subversive Activities" was submitted in 1943 and it found that the "American Peace Mobilization openly aided and abetted widespread sabotage strikes in the most important American defense industries, thereby seriously hampering our national preparedness to meet just such military crises as that of Pearl Harbor." H. Rep. No. 2748, 77th Cong., 2d Sess. (1943), p. 9. The report went on to enumerate nine instances in which Communist leadership had contributed to sabotage strikes in defense industries. *Id.* at 9-10. See also H. Rep. No. 2742, 79th Cong., 2d Sess. (1947); H. Rep. No. 1920 (reporting on Public Law 601), 80th Cong., 2d Sess. (1948).

A 1949 report of the House Committee on Un-American Activities reported on the Communist espionage apparatus at work in the radiation laboratory

of the University of California at Berkeley, where work had been done on the atomic bomb. H. Rep. 1952, 81st Cong., 2d Sess. (1949); see also *Hearings Regarding Communist Infiltration of Radiation Laboratory and Atomic Bomb Project at the University of California, Berkeley, Calif. before the House Committee on Un-American Activities*, 81st Cong., 1st Sess. (1949). And President Truman, in urging the Congress to enact internal security legislation other than the Control Act which was then under legislative consideration, noted that the "dangers [of Communism] come, not from normal political activity, but from espionage, sabotage, and the building up of an organization dedicated to the destruction of our Government by violent means—against all of which we already have laws." H. Doc. No. 679, 81st Cong., 2d Sess. (1950), p. 6. The President's message accompanying his veto of the Internal Security Act of 1950 also agreed that it was necessary to "prevent espionage, sabotage, or other actions endangering our national security." H. Doc. No. 708, 81st Cong., 2d Sess. (1950), p. 6. With respect to Section 5(a)(1)(D), the President's veto message said (*id.* at 7):

> It is claimed that this bill would prohibit the employment of Communists in defense plants. The fact is that it would be years before this bill would have any effect of this nature—if it every [*sic*] would. Fortunately, this objective is already being substantially achieved under the present procedures of the Department of Defense, and if the Congress would enact one of the provisions I have recommended—which it did not

include in this bill—the situation would be entirely taken care of, promptly and effectively.[8]

The history of the legislative and executive consideration of the substance of Section 5(a)(1)(D) shows, we submit, general agreement on the proposition that substantial dangers of espionage and sabotage were presented by the employment in defense facilities of members of Communist organizations. Testimony presented to Congressional committees since the enactment of the Subversive Activities Control Act buttresses that conclusion. Illustrative is the testimony of Ralph N. Stohl, Director, Office of Domestic Security Programs, Department of Defense, who told the Subcommittee (*Hearings on S. 681 before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess., p. 222):

> A Communist, as a potential saboteur, regularly employed in these vital facilities would have an excellent opportunity in many instances to become thoroughly familiar with the most essential functional areas in the plant. * * * The ways and means employed by a saboteur to inflict dam-

[8] By letter of August 8, 1950, President Truman had recommended, *inter alia*, "that the Congress remedy certain defects in the present laws concerning * * * the security of national-defense installations, * * * by giving broader authority than now exists for the President to establish security regulations concerning the protection of military bases and other national-defense installations." *Message from the President of the United States Transmitting Recommendations Relative to Preserving our Basic Liberties and to Protecting the Internal Security of the United States*, H. Doc. No. 679, 81st Cong., 2d Sess., p. 5.

age are as varied as human imagination. However, when such talents are exercised against vital areas of facilities considered highly essential to our Nation's defense, the loss can be as serious as a major military reverse. The employment of known Communists in this type of facility enhances the possibilities of sabotage. Common sense dictates the removal of such individuals from these plants.[9]

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[9] See also the testimony of Wilbur Brucker, General Counsel of the Department of Defense (later Secretary of the Army), who testified at the same hearings (pp. 8, 10):

> The need to protect this vital asset [industrial capacity] against possible sabotage or espionage is self-evident. Yet I appear before you today with the knowledge that there are known subversives now working in vital defense facilities without there being adequate authority in the Federal Government to meet this potential threat to our productive capacity and therefore to our military effectiveness.
>
> * * * *
>
> The history of the Communist conspiracy requires us to assume that the hard-core Communists will act to the detriment of this country by whatever means they have at their command, including sabotage, which action would coincide with surprise attack on the country. * * * If the saboteur accomplishes his mission, it is then too late.

And at *Hearings before the House Committee on Un-American Activities* entitled "Investigation of Communist Penetration of Communications Facilities—Part 2", 85th Cong., 1st Sess. (October 9, 1957), the Director of the Department of Defense's Office of Personnel Security Policy testified as follows (p. 1814):

> The Department of Defense has actively supported proposed legislation that would permit the removal of dangerous persons from facilities vital to our Nation's security. The Department cannot assure the Congress and the American people that all reasonable measures have been taken to safeguard our national security if

It was not until 1962, after this Court's decision in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, that the Secretary of Defense was able to begin to implement the provisions of Section 5(a)(1)(D). Having obtained an amendment of the original provision which required him to list all "defense facilities" in the Federal Register (76 Stat. 91), the Secretary promulgated a classified list of "defense facilities" pursuant to the duties assigned to him by Section 5(b). The plants designated by the Secretary as "defense facilities" consisted of the following five categories (App. A, pp. 58-59, *infra*):

1. Facilities engaged in important classified military projects
2. Facilities producing important weapons systems, subassemblies and their components
3. Facilities producing essential common components, intermediates, basic materials and raw materials [10]

Communists or other subversives, regardless of what inspires them or the source of coercion to which they might be subjected, are permitted to work in these vital facilities.

[10] "Common components" are components used for both military and essential civilian activities. Transformers or circuit-breakers used in generating electric power may, for example, be put to civilian and military uses. A plant is designated as a defense facility, however, only if it actually supplies a substantial portion of its manufactured product to the military establishment. "Intermediates" are principally chemicals such as, for example, sulphuric acid. "Basic materials" are products such as petroleum, and "raw materials" refers to basic metals or minerals.

expression, section 5(A)(1)(D) has an impermissible "chilling effect" on freedom of expression.

The underlying premise of the government's defense of section 5(a)(1)(D), that we are at war with the Soviet Union in every sense but "technically," is fallacious as a matter of law and flouts our national policy.

C.

The interpretation given section 5(a)(1)(D) by the court below in order to save it is erroneous under *Aptheker v. Secretary of State.*

II.

The indictment is defective because it fails to allege that the Communist Party is a Communist-action organization.

A.

The government interprets section 5(a)(1)(D) as making an order that an organization register as a Communist-action organization conclusive of its character as such, thereby dispensing with the requirements that its actual character be alleged and proved. This interpretation is erroneous.

1. The text of section 5(a)(1)(D) makes clear that it applies only to members of organizations (a) which *are* Communist-action organizations and (b) which have registered or have been ordered to register. That this result was deliberate is confirmed by the comparative wording of other criminal provisions of the Act.

2. The government's interpretation of section 5(a)(1)(D) raises serious constitutional questions which may be avoided by adhering to the text of the statute.

a. The section, as interpreted by the government, denies appellee procedural due process. The only justi-

fication for applying the section to members of the Communist Party is that the Party is a Communist-action organization. Under the government's interpretation, appellee is concluded on this issue by the 1953 registration order against the Party, and thereby denied an opportunity to contest the factual premise on which his criminal liability depends. Appellee is entitled, at a minimum, to an opportunity to show that the Board's 1953 finding that the Communist Party was a Communist-action organization is no longer tenable. The government's interpretation of section 5(a)(1)(D) denies him that opportunity.

b. Section 5(a)(1)(D), as interpreted by the government, denies appellee the constitutional safeguards of indictment, trial by jury, and proof of guilt beyond a reasonable doubt. This is so because, under that interpretation, the determination that the Communist Party is a Communist-action organization — a fact constitutionally prerequisite to the guilt of appellee — is severed from the criminal proceeding and made administratively on the basis of a mere preponderance of the evidence.

c. Section 5(a)(1)(D), as interpreted by the government, is a bill of attainder since the determination on which the infliction of punishment depends — that the Communist Party is a Communist-action organization — is made by the Board and not judicially. So interpreted, the section is a bill of attainder for the further reason that it applies not to members of an organization having legislatively described characteristics, but to an organization specified by the Board in 1953, whether it currently fits the statutory description or not.

B.

If the government's interpretation of section 5(a)(1)(D) is accepted, the section is unconstitutional for the reasons above stated.

III.

Section 5(a)(1)(D) violates procedural due process by making designations of defense facilities by the Secretary of Defense conclusive upon persons adversely affected without affording them an opportunity for a hearing or judicial review. The section thereby violates the "rudimentary requirements of fair play" that persons may not be deprived of liberty or property by administrative action without according them an opportunity to be heard and present evidence in opposition. The requirement of a hearing is of peculiar importance here because the factual accuracy of the Secretary's determination is prerequisite to the constitutional application of section 5(a)(1)(D) and because of the vagueness of the statutory standard.

The Act cannot be interpreted as providing for review of the Secretary's determination in criminal prosecutions for violating section 5(a)(1)(D). Nor would such an interpretation save section 5 since persons may not be required to undergo criminal prosecution as the price of securing a hearing on the validity of the Secretary's determination.

IV.

Section 5(a)(1)(D) cannot constitutionally be applied to appellee unless the Communist Party is a Communist-action organization. Under the Act's definitions, an organization cannot be a Communist-action organization unless there exists a world Communist movement as described in section 2. It is a matter of judicial notice that the section 2 findings that there exists a monolithic world Communist movement, dominated, disciplined and controlled by the Soviet Union, are anachronistic. Yet the Act affords

appellee no means for securing a Board determination that there is no present factual predicate for the registration order. It is therefore incumbent on the Court, in the words of *Communist Party v. S.A.C.B.* "to say that the 'world Communist movement,' as Congress meant the term in 1950 . . . no longer exists." If, however, the section 2 findings may not be disturbed, even if untrue, then section 5(a)(1)(D) violates procedural due process and is a bill of attainder.

ARGUMENT

I.

Section 5(a)(1)(D), as written and applied, violates substantive due process and the First Amendment. It is not susceptible of the construction given it by the court below.

Section 5(a)(1)(D), as written, prohibits the employment in a defense facility of any person (a) who is a member of a Communist-action organization which is subject to a final order requiring it to register as such, and (b) who has "knowledge or notice" of the order. The second requirement is satisfied by publication in the Federal Register of the fact that the order has become final. Sec. 13(k). The section therefore makes it a crime for an individual to engage in defense facility employment solely because of his membership in a proscribed organization.[9]

It is irrelevant under section 5(a)(1)(D), as written and applied in the indictment (R. 1), that the member does not know or believe that the organization has an unlawful purpose or any of the characteristics of a Communist-action organization as defined in the Act and found by the Board. It is likewise irrelevant that the member is a loyal Amer-

[9] Section 5(b) provides that the conspicuous posting in a defense facility of its designation as such "shall be sufficient to give notice of such designation to any person subject thereto."

ican who has never committed and does not intend to commit an unlawful or subversive act of any kind. Indeed, the section applies to a member who has engaged in no organizational activity whatsoever. It also applies to a member like appellee who, as the District Court found (*supra*, p. 6), has a long history of satisfactory employment in the very job which the Secretary's designation now makes it a crime for him to hold.

Moreover, section 5(a)(1)(D) forbids a member from holding any kind of job in a defense facility, whether or not it is security-sensitive. Thus the indictment does not allege the nature of appellee's employment at the Todd shipyard, nor need it do so. For once the Secretary makes a designation under sections 3(7) and 5(b), it becomes unlawful for a member of a proscribed organization to hold *any* job in the designated facility, including one that is obviously non-sensitive.

Section 5(a)(1)(D) in effect establishes a presumption that all members of a proscribed organization, simply because of their membership, will be likely to engage in espionage, sabotage or other unlawful activity endangering the national security whenever they are given access to an establishment which has been designated as a defense facility. This presumption is an extreme example of the imputation of guilt from assocation.

Moreover, the presumption is conclusive. The member is not permitted to rebut it by establishing that, notwithstanding his membership, he is a loyal, law-abiding citizen and that his job, by its nature, does not lend itself to acts endangering the national security, even assuming an inclination on his part to commit them.

The restriction on employment which this irrebuttable presumption imposes on members of a Communist-action organization is substantial. The Secretary of Defense has already designated some 3000 establishments as defense facilities (Govt. Br. 28). Moreover, the absolute discre-

tion of the Secretary to make designations (see *infra*, pp. 55 - 57) and the vagueness of the statutory standard[10] empower him to designate almost any place of employment as a defense facility and thereby drastically to curtail the jobs which members of a proscribed organization may hold.

In what follows, we show that section 5(a)(1)(D), as written and as applied in the indictment, "infringes unnecessarily on protected freedoms" (*Aptheker v. Russell*, 384 U.S. 11, 19) and therefore violates substantive due process and the First Amendment. We then show that the section is not susceptible of the construction given it by the District Court (R. 9) and, hence, that it cannot be saved by interpretation.

A. Substantive due process.

Legislation disqualifying defined classes of persons from particular types of employment is subject to due process limitations. "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492, and cases there cited. And see *Wieman v. Updegraff*, 344 U.S. 183, 191-92.

Section 5(a)(1)(D) must therefore satisfy the due process requirement that a deprivation of liberty or property "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v.*

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[10] Section 5(b) authorizes the Secretary to designate as a defense facility any place of employment "with respect to the operation of which he finds and determines that the security of the United States requires the application of subsection (a) of this section."

New York, 291 U.S. 502, 525; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39.

The "object sought to be obtained" by section 5(a)(1)(D) is to protect the national security against the supposed dangers which Congress found that the world Communist movement presents to our national security. *Aptheker v. Secretary of State*, *supra*, at 505, 509. As *Aptheker* and other decisions of the Court establish, however, the section violates due process even on the assumption that the Congressional findings are accurate. Moreover, as experience and the 1953 findings of the Board in the Communist Party registration proceeding demonstrate, there is no real danger of the sort that section 5(a)(1)(D) purports to avert.

1. The invalidity of section 5(a)(1)(D) is established by *Aptheker v. Secretary of State*.

Aptheker invalidated section 6 of the Act, which made it a crime for a member of a Communist-action organization, simply because of his membership, to apply for or use a passport. The Court held, at 505, that the section "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment." The reasons stated by the Court for this conclusion demonstrate that that case is controlling here.

(a) Section 6, like section 5, applied to all members of a Communist-action organization having knowledge or notice of the issuance of a final registration order against the organization. Thus, as *Aptheker* found (at 509-10), the section was applicable "whether or not the member actually knows or believes that he is associated with what is deemed to be a 'Communist-action' or a 'Communist-front' organization," and "whether or not one knows or believes that he is associated with an organization operating to further the aims of the world Communist movement." Accordingly, the Court concluded (at 510) that

section 6 "sweeps within its prohibition both knowing and unknowing members." Section 5(a)(1)(D), as we have seen, has the same vice.

(b) Section 5, like section 6, "also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose" (*Aptheker*, at 510). It therefore precludes consideration of factors that, to paraphrase *Aptheker* (*ibid.*), "bear on the likelihood" that defense facility employment "by such a person would be attended by the type of activity which Congress sought to control." Section 5, like section 6, thus "establishes an irrebuttable presumption," which is contrary to experience, "that individuals who are members of the specified organizations will," if given an opportunity, "engage in activities inimical to the security of the United States" (*Aptheker* at 511).

(c) *Aptheker* found (at 511-12) that section 6 excluded consideration of two relevant factors, "the purposes for which an individual wishes to travel," and the "security-sensitivity of the areas in which he wishes to travel." Section 5(a)(1)(D) excludes analogous considerations. It applies to jobs which are not security sensitive (see *supra*, p. 14), and to individuals who seek only to earn a living and who, as the government acknowledges (Br. 38), "would never consider committing either sabotage or espionage."

(d) In concluding that section 6 violate substantive due process, *Aptheker* held it an important consideration (at 512-13) "that Congress has within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security." The Court found examples of these "less drastic" means (at 513-14) in the Federal Employee Loyalty Program and in passport legislation proposed by President Eisenhower, both of which made membership in a Communist organization only one factor to be weighed in determining the qualification of an individual. Two additional examples are relevant to the

question of industrial security with which section 5(a)(1)(D) is concerned.

One of these is the Industrial Security Program administered by the Department of Defense under Executive Order 10865 of February 20, 1960, 3 C.F.R. 398.[11] The regulations establishing the program are contained in 32 C.F.R., Subchapter D, Part 155. They are "less drastic" than section 5(a)(1)(D) in two respects. First, they do not bar persons who lack security clearance from employment with firms having defense contracts but only from access to classified information. This limitation reflects the common sense view of *Cole v. Young*, 351 U.S. 536, 546-47, that there is no danger from the employment of security risks in non-sensitive jobs. Second, the regulations make membership in a Communist organization only one consideration "which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access authorization." 32 C.F.R. 155.3-3.

Another example of "less drastic" means is provided by the bill "to coordinate the administration of Federal personnel loyalty and security programs" proposed in the 1957 Report of the Commission on Government Security pursuant to P.L. 304, 84th Cong., pp. 691-727. Section 71 of the proposed bill adopts the approach of denying disqualified individuals access to classified information, but not all employment, in defense facilities. This follows the finding of the Report (p. 273) that exclusion from employment in non-sensitive jobs is "objectionable and unnecessary." Section 71 further provides that in determining whether an individual should receive security clearance, consideration should be given to his membership in any group which has been found by a federal agency "to have been organized or utilized for the purpose of advancing

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[11] This program replaced earlier post-war industrial security programs along similar lines described in *Greene v. McElroy*, 360 U.S. 474.

the aims and objectives of the Communist movement." Section 71 provides, however, that in determining the significance to be given to such membership by an individual, "consideration must be given" to his "actual knowledge" of the purpose of the organization, his own purpose in becoming a member, and the degree of his participation in the activities of the organization.

Aptheker (at 513, n. 12) also found significance in the views of the Department of Justice, expressed to Congress in 1950, opposing proposed legislation which predicated a conclusive presumption of unfitness for federal employment on the fact of organizational membership alone. Similarly, President Truman opposed the enactment of section 5 of the Act as unwise and unnecessary both in a message to Congress before its enactment (H. R. Doc. No. 679, 81st Cong., 2d Sess., pp. 3-4) and in his veto message (H. R. Doc. No. 708, 81st Cong., 2d Sess., pp. 6, 7). While Congress rejected these views when it passed the Act, their importance resides, as stated in *Aptheker* (at 514), in the fact that "they demonstrate the conviction of the Executive Branch that our national security can be adequately protected by means which, when compared with § 6 [and § 5], are discriminately tailored to the constitutional liberties of individuals."

Aptheker concluded (at 514) that the considerations reviewed above "compel the conclusion that § 6 of the Control Act is unconstitutional on its face" because it "sweeps too widely and too indiscriminately across the liberties guaranteed by the Fifth Amendment." Like considerations compel the same conclusion with respect to section 5(a)(1)(D).

The government (Br. 46-47) suggests four grounds for distinguishing the present case from *Aptheker*. There is no substance to any of them.

(a) It is said (Govt. Br. 46) that section 6 "applied to members of 'Communist-front' and 'Communist-infiltrated' organizations as well as to members of 'Commu-

nist-action groups'."[12] But *Aptheker* invalidated section 6 as applied to members of what the Board found to be a Communist-action group and (at 515) to "top ranking leaders" at that.

(b) It is said (Govt. Br. 46-47) that section 6 "infringed upon a more basic freedom—the right to travel" than does section 5(a)(1)(D). But the right to work, which section 5 infringes, is an equally "basic freedom" protected by the Fifth Amendment. See *supra*, p. 15. [13]

(c) The government argues (Br. 47) that section 6 of the Act, unlike section 5, "imposed an absolute prohibition in a situation where a 'less drastic' remedy could have achieved the same purpose." But, as we have shown (*supra*, pp. 17-19), a similar remedy was available for the protection of defense facilities. The government urges, however (Br. 34), that a statute providing for the security-clearance of employees of defense facilities is administratively infeasible because it "would cast a staggering burden on the Department of Defense with respect to all present employees."

The government does not, and cannot, document this assertion. It appears from its brief (p. 18) that by 1956 the Department of Defense had screened 3,000,000 employees of defense contractors, and the number is undoubtedly much greater today. The government does not tell us the number of employees in the defense facilities which have so far been designated but only (Br. 28) that the 3000 plants comprised in the designations represent less than one per cent of the nation-wide total. Obviously, screening the employees of these plants presents

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[12] The government is in error in stating that section 6 applied to members of Communist-infiltrated organizations. See *supra*, p. 2, n. 1.

[13] The government's brief in *Aptheker* (p. 54) characterized the denial of passports as "a considerably milder disability than loss of employment."

no "staggering burden," particularly since many, if not most of them, have already been screened under the existing Industrial Security Program.

The government further argues (Br. 39-40) that Congress could rationally conclude that a screening program would not "immediately protect the interest for which the statute was designed." But as President Truman warned in his veto message, *supra*, (p. 7):

> "It is claimed that this bill would prohibit the employment of Communists in defense plants. The fact is that it would be years before this bill would have any effect of this nature – if it every [sic] would."

It is now sixteen years since that warning was given, and section 5(a)(1)(D) is still in litigation. Certainly, if Congress was concerned with immediacy, it could have chosen no more effective device than section 5(a)(1)(D) to frustrate that objective.

(d) Finally, the government urges (Br. 46) that *Aptheker* is distinguishable because foreign travel "involved a much lesser risk to national security than does access to defense facilities." This down-grading of the alleged danger from travel abroad by American Communists contradicts the representations made by the government in its brief in *Aptheker*, long sections of which (pp. 25-45, 81-87) were devoted to a lurid account of the menace which such travel represents. The account in the present brief (pp. 15-26) of the supposed danger of espionage and sabotage by Communist employees of defense facilities is shorter and not so lurid, but it is no more convincing.

The major world powers doubtless spy on each other. But we are aware of no case in which an American Communist employed in a defense facility has been charged, let alone convicted, of espionage. The government cites only one instance of supposed espionage, and evidently knows of no other deemed relevant. The instance

referred to (Govt. Br. 23-24) is taken from hearings and a report of the House Committee on Un-American Activities concerning "the Communist espionage apparatus at work in the radiation laboratory of the University of California at Berkeley, where work had been done on the atomic bomb." The existence of this "apparatus" was testified to by one Paul Crouch, a renegade Communist turned professional anti-Communist witness. Hearings before Committee on Un-American Activities, H. R. 81st Cong., 1st Sess., May 6, 1949, pp. 201-02. Crouch testified for the government in the Communist Party registration proceeding where he told the same story which is the subject of the House Committee report. See transcript of record in *Communist Party v. S.A.C.B.*, No. 48, Oct. Term, 1955, pp. 428-30. However, the story was expunged from the record along with the rest of Crouch's testimony as a result of the Party's undenied allegations that the testimony was perjurious. See *Communist Party v. S.A.C.B.*, 351 U.S. 115, and *Communist Party v. S.A.C.B.*, 367 U.S. 1, 20-21.[14] On the government's own showing, therefore, there is not a single credited case of espionage by a Communist employee of a defense facility, either before or after the enactment of the Act.

Sabotage, by its nature, is incapable of concealment. Yet the government, which urges (Br. 31) that the imminent danger of sabotage justifies section 5(a)(1)(D) as a preventive measure, cannot point to a single act of this kind of which a Communist was even suspected. We have found only five reported prosecutions under the sabotage statutes, 18 U.S.C. 2151, 2153-56, since their enactment in 1918.[15] Two occurred in World War I and three in

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[14] Hereafter, the decision affirming the Board's registration order, reported at 367 U.S. 1, will be referred to as *Communist Party v. S.A.C.B., supra.*

[15] *United States v. DeBolt*, 253 F. 78; *Weisman v. United States*, 271 F. 944; *Schmeller v. United States*, 143 F.2d 544; *Roedel v. United States*, 145 F.2d 819; *United States v. Antonelli Fireworks Co.*, 155 F.2d 631.

World War II. None involved Communists, and none has been instituted since the 1953 amendment making the sabotage laws applicable during the national emergency proclaimed by the President. 18 U.S.C. 2157(a).

The most that the government can come up with to document the supposed danger of sabotage (Br. 23) is the stale charge of the House Committee on Un-American Activities that, prior to Hitler's invasion of the Soviet Union, Communist trade union leaders "had contributed to sabotage strikes in defense industries." But the Committee's use of the pejorative adjective does not make a strike any the less lawful. And the exclusion of all Communists from defense facility employment is obviously inappropriate to prevent radical trade union leaders from calling so-called political strikes. This was the ostensible purpose of section 9(h) of the Taft-Hartley Law and section 504 of the Landrum-Griffin Act. See *American Communications Association v. Douds*, 339 U.S. 382, and *United States v. Brown*, 381 U.S. 437.

The fact is — as the government's own showing makes plain — that the alleged danger from the employment of Communists in defense facilities rests on nothing more substantial than the exaggerated fears, generated by the Korean War, which persisted throughout the period of McCarthyism.

2. Section 5(a)(1)(D) is invalid under decisions of the Court that individual guilt or disqualification for employment may not be conclusively presumed from membership in the Communist Party.

It is an established principle of due process that individual guilt or disqualification for employment may not be conclusively presumed merely from the fact of organizational membership, including membership in the Communist Party. Under the authorities, guilt or disqualification may be established only upon a showing that membership is accompanied by the personal factors of knowledge that

the organization has an unlawful purpose, an intent to effectuate this purpose, and activity to that end. *Scales v. United States*, 367 U.S. 203; *Noto v. United States*, 367 U.S. 290; *Elfbrandt v. Russell*, 384 U.S. 11; *Adler v. Board of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183. In short, the rule of *Aptheker* applies to employment.

Scales, at 224-28, sustained the membership clause of the Smith Act only by construing it to require proof that the accused had knowledge of the organization's violent objective, that he was an "active" member, and that he personally intended to help accomplish the organization's unlawful purpose.

The Court emphasized (at 229) that since the membership clause requires proof that the accused intended to bring about forcible overthrow, "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute." Similarly, *Noto* stated (at 299) that the element of criminal intent which was read into the membership clause "must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of the organization, but not specifically intending to accomplish them by violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."

The government argues (Br. 47) that the factors of guilty knowledge, intent and activity, which the Court found essential to the constitutionality of the membership clause, are not requisite to section 5(a)(1)(D) because, unlike the membership clause, it does not directly prohibit membership in a proscribed organization. However, *Aptheker* (at 512) relied on the rule of *Scales* and *Noto* in holding the passport ban of the Act invalid. And three other decisions of the Court have applied the same rule in invalidating statutes which made membership in a Com-

munist organization a disqualification for public employment.

Elfbrandt v. Russell, supra (at 13) involved an Arizona statute which required the discharge of any state employee who "knowingly and wilfully becomes or remains a member of the Communist Party of the United States" or other organization having as a purpose the overthrow of the government of Arizona, "where the employee had knowledge of the unlawful purpose." The Court held (at 16) that the disqualification of a member "who does not subscribe to the organization's unlawful ends" was fatal to the constitutionality of the statute under the decisions in *Scales, Noto* and *Aptheker*. The Court noted (at 17) that, "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or public employees." Accordingly, the Court concluded (at 19) that the statute "infringes unnecessarily on protected freedoms." The more so does section 5(a)(1)(D), which disqualifies a member who even lacks knowledge of any unlawful organizational purpose.

The government argues (Br. 41) that *Elfbrandt* is distinguishable "in the light of the substantially graver governmental interest involved here." But at least some jobs in a state government (e.g., in armories and other national guard establishments, in public service commissions, and as factory inspectors) offer greater opportunities for espionage and sabotage than do the many insensitive jobs in factories and utilities that have been designated as defense facilities (see Govt. Br. 58). *Elfbrandt* invalidated the Arizona statute as applied to all State employment because of its indiscriminate disqualification of members who (at 17) "surely pose no threat, either as citizens or public employees." Such members "surely pose no threat" as defense facility employees either.

Adler v. Board of Education, supra, sustained a New York statute authorizing the Board of Regents to list orga-

nizations found, after a hearing, to advocate violent overthrow of the government, and making membership in a listed organization with knowledge of its unlawful purpose prima facie evidence of disqualification for employment in the public schools. The statute, however, accorded the accused teacher a hearing at which he could rebut the prima facie case against him by evidence that he was nevertheless qualified. Thus, as the Court stated (at 492), the statute applied only to persons holding "*unexplained* membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force and violence, *and known by such persons* to have such purpose" (emphasis supplied). The Court held that the statute did not deny due process, but only because (at 495) "The presumption [of disqualification for membership with guilty knowledge] is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it." The Court added (at 496, emphasis supplied):

> "Where, as here, the relation between the fact found and the presumption is clear and direct *and is not conclusive*, the requirements of due process are satisfied."

The government (Br. 45-46) misrepresents *Adler* by describing the New York statute as one "which makes any member of an organization advocating overthrow of the government by force or violence ineligible for employment in the public schools." This description omits all of the features of the statute which led the Court to sustain it. They are likewise the features whose absence is fatal to section 5.

Wieman v. Updegraff, supra, invalidated an Oklahoma statute requiring state employees, as a condition of employment, to swear that they were not members of any organization which had been listed as subversive by the Attorney General of the United States. The Court noted (at 189) that the disqualification in *Adler* was based on membership only when coupled with "knowledge of orga-

nizational purpose," whereas (at 190) under the Oklahoma statute, "the fact of membership alone disqualifies." It held this difference decisive, stating (at 191):

> ". . . under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

Section 5(a)(1)(D) must fall for the same reason.

The government's representation (Br. 30) that *Wieman* relates only to past membership is plainly untrue. The statutory oath contained discrete clauses, one disclaiming present, the other past, membership in any organization on the Attorney General's list at the time the statute was passed. 344 U.S. at 184-86. The Court drew no distinction between the two clauses, but invalidated both because of their failure to require knowledge of the organization's bad character. The case therefore squarely holds that a person may not be denied public employment merely because of present membership in an organization which has been officially condemned. And the Court has so interpreted the holding. See, e.g., *Lerner v. Casey*, 357 U.S. 468, 474, 477; *Beilan v. Board of Education*, 357 U.S. 399, 414-15 (dissenting opinion); *Barsky v. Board of Regents*, 347 U.S. 442, 473 (dissenting opinion).

Wieman also contradicts the government's thesis (Br. 39) that section 5(a)(1)(D) satisfies the requirement of scienter because knowledge of the organization's obligation to register is the equivalent of knowledge of its unlawful purpose. *Wieman* — like *Aptheker* (at 509-10) — ruled that the requisite scienter is knowledge that the oganization is in fact subversive, not merely that it has been officially found to be so. Due process does not permit the condemnation of an individual simply because he disagrees with an official verdict.

The principle of *Elfbrandt, Adler* and *Wieman* that a disqualification for employment may not be imposed solely on account of organizational membership applies in this case *a fortiori*. Those decisions involved public employment, in which the government has a proprietary as well as a security interest. And the statutes that were there involved merely made individuals ineligible for employment. Section 5 goes further by imposing criminal penalties on members of organizations for holding private employment.

The government (Br. 45-46) cites *Gerende v. Board of Supervisors*, 341 U.S. 56; *Garner v. Board of Public Works*, 341 U.S. 716; *Beilan v. Board of Public Education*, 357 U.S. 399; *Lerner v. Casey*, 357 U.S. 468; *Konigsberg v. State Bar*, 366 U.S. 36; and *In re Anastaplo*, 366 U.S. 82, for the proposition that the Court has "upheld State laws imposing far more severe restrictions upon members of the Communist Party" than those contained in section 5(a)(1)(D). None of these decisions gives the slightest support to this description.

Gerende is cited (Br. 45) as upholding a Maryland requirement that every candidate for public office swear that he is not engaged in an attempt to overthrow the government by violence. To the contrary, this portion of the oath, which concerned the candidate's personal innocence of crime, was not attacked in *Gerende*. And it, of course, has no resemblance to the disqualification of section 5(a)(1)(D), which is imposed without regard to personal innocence. The portion of the oath which was at issue in *Gerende* disclaimed membership in an organization engaged in an attempt at violent overthrow. The Court sustained it only because Maryland construed it to relate to membership with *knowledge* of the organization's criminal activity. The sanction of section 5(a)(1)(D), in contrast, is imposed on persons who have no knowledge that the Communist Party is in fact a Communist-action organization as the Board found it to be, let alone that it is, or even has been found to be, engaged in criminal activity.

Garner involved two separate and distinct questions. One concerned the validity of an oath requiring public employees to disclaim membership in organizations which advocate violent overthrow. As in *Gerende, supra,* the Court sustained the oath (at 723-24) by construing it to apply only to membership with knowledge that the organization in fact engages in the proscribed advocacy. The government misrepresents this portion of the decision (Br. 39) by omitting the knowledge requirement that the Court read into the oath. Moreover, the holding that the oath, as so construed, was valid has been overruled, *sub silentio,* by *Elfbrandt v. Russell, supra.*

The second question decided by *Garner* was that membership of a person in the Communist Party is relevant to his qualifications for public employment, and hence that he may constitutionally be required to disclose his membership. The Court stated, however (at 720), "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge." Accordingly, nothing in *Garner* supports the government's contention that a person may be disqualified from public employment solely because of his membership in the Communist Party.

Beilan v. Board of Public Education, Lerner v. Casey, Konigsberg v. State Bar, and *In re Anastaplo,* all *supra,* simply reiterate the ruling of *Garner* that public employees and applicants for admission to the bar may be required to disclose membership in the Communist Party. Not at issue was whether such membership, standing alone, was disqualifying. Thus *Lerner v. Casey* states (at 474-75):

> "Finally, the claim that the statute offends due process because dismissal of an employee may be based on mere present membership in the Communist Party, without regard to the character of such membership, cf. *Wieman v. Updegraff,* 344 U.S. 183, must also fail. Apart from the fact that the statute simply makes membership in an organization found

> to be subversive one of the elements which may enter into the ultimate determination as to 'doubtful trust and reliability,' appellant * * * was not discharged on grounds that he was a party member."

The government's reliance (Br. 38-39) on *Harisiades v. Shaughnessy*, 342 U.S. 580; *Galvan v. Press*, 347 U.S. 522, and *Carlson v. Landon*, 342 U.S. 524, is likewise misplaced. These decisions, themselves dubious, rested on the broad power of Congress over the admission and deportation of aliens, uninhibited by requirements of substantive due process. See *Harisiades* at 597 (concurring opinion); *Galvan* at 530-32. Moreover, the authority of *Carlson*, which sustained preventive detention of alien Communists awaiting deportation, has been impaired by *United States v. Witkovich*, 353 U.S. 194.

The government (Br. 44-45) also relies on *American Communications Association v. Douds*, 339 U.S. 382, an authority of doubtful validity in light of *United States v. Brown*, 381 U.S. 437. Moreover, as pointed out in *Aptheker* (at 512, n. 11), the case is distinguishable since section 9(h) of the Taft-Hartley Law, unlike section 5(a)(1)(D), "did not affect basic individual rights to work." [16]

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[16] The government (Br. 16, 34) makes several references to section 9A of the Hatch Act (5 U.S.C. 118p(2)) disqualifying persons from federal employment for membership in an organization "that advocates the overthrow of our constitutional form of government, knowing that such organization so advocates." The government cites the statute as though its mere presence on the books somehow bolsters the constitutionality of section 5(a)(1)(D). But this statute, which has never been tested, is obviously unconstitutional under *Elfbrandt v. Russell*, *supra*, and — since the advocacy of the organization need not include violence — under *Baggett v. Bullitt*, 377 U.S. 360, 370, as well. Moreover, the statute, unlike section 5(a)(1)(D), makes knowledge of the purposes of the organization prerequisite to the disqualification.

3. The Congressional findings on which section 5(a)(1)(D) is based are negated by the findings of the Board in the Communist Party registration proceeding.

The Congressional justification for section 5(a)(1)(D) is stated in the findings of section 2(1) and (11) that it is the purpose of the world Communist movement to establish "Communist totalitarian dictatorships" by means, among other things, of espionage and sabotage, and that "agents of communism have devised clever and ruthless espionage and sabotage tactics."

As we have already seen, however (*supra*, pp. 21-23), there was no evidence before Congress of espionage or sabotage by Communist Party members in defense facilities. Moreover, although the Report of the Board in the Communist Party registration proceeding found that the Party "operates primarily to advance the objectives of such world [Communist] movement,"[17] it found no acts of or plans to commit espionage or sabotage by the Party or its members. Thus, the findings of section 2 with reference to espionage and sabotage have no basis in fact with respect to the Communist Party.

The Report of the Board likewise contradicts the finding of section 2(15) that "the Communist organization in the United States * * * and the nature and control of the world Communist movement" present a danger to the national security. The ultimate objective of establishing a Communist regime in this country, which section 2(1) attributes to the world Communist movement, is not of itself a "danger" against which Congress may constitutionally legislate. For however repugnant a "Communist totalitarian dictatorship" as defined by the Act may be, it is not an evil which Congress has power to prevent so long as the means employed to achieve it are peaceable. "If in the long run, the beliefs expressed in proletarian

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[17] Transcript of record in *Communist Party v. S.A.C.B.*, No. 537, Oct. Term, 1959, p. 2644.

dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Holmes, J., dissenting in *Gitlow v. New York*, 268 U.S. 652, 673.

Hence the constitutional justification for section 5(a)(1)(D) must rest on the findings of section 2 that Communist-action organizations of various countries attempt to secure their ultimate objective by forcible or other unlawful means. As the Report of the Board demonstrates, however, there is no factual basis for this finding in the activities of the Communist Party.

The Report (*id.*) found that it is the objective of the Communist Party "to install a Soviet style dictatorship in the United States." But there is no finding that the Party has ever used unlawful means to attain this objective. Nor was it found that the Party incites force or violence. At most, the Report (p. 2635) found Party advocacy of forcible overthrow as a matter of abstract doctrine, and the Court so viewed the findings. *Communist Party v. S.A.C.B.*, *supra*, at 56 (majority opinion) and 130-33 (dissent of the Chief Justice).

Advocacy of forcible overthrow as a matter of doctrine without incitement to action, is constitutionally protected and may not be punished. *Yates v. United States*, 354 U.S. 298; *Noto v. United States*, 367 U.S. 290. Accordingly, the Board findings are as bare of unlawful advocacy as they are of unlawful acts. The fact is that the Communist Party was found to be a Communist-action organization on no more substantial grounds than that, in the words of the Court of Appeals, it has an "intellectual affiliation to a cause," the cause of Communism. *Communist Party v. S.A.C.B.*, 277 F.2d 78, 83.

There is thus no foundation in fact for the government's contention (Br. 55) that a member of the Communist Party who is notified of the order that it register, "has knowledge

— or is grossly negligent in failing to have knowledge — of its unlawful purposes."

The majority in *Communist Party v. S.A.C.B.*, 367 U.S. 1, held (at 56) that a Board finding that the Party was engaged in unlawful acts or advocacy was not a prerequisite to an order that it register under the Act. (But see the dissent of the Chief Justice, at 130-33.) This holding was based on the view that insofar as the registration requirement is concerned, the Act "is a regulatory, not a prohibitory statute." However that may be with respect to the disclosure provisions of the Act, it is plainly not true of section 5(a)(1)(D), as implemented by the criminal penalties of section 15.

Because section 5(a)(1)(D) is a "prohibitory statute," its application to members of an organization found to be a Communist-action organization must be conditional upon Board findings which match the findings of section 2 that the organization has engaged in, conspired to commit, or incited unlawful conduct. Since the Board made no such findings concerning the Communist Party, section 5(a)(1)(D) may not constitutionally be applied to Party members.

B. *The First Amendment*

Section 5(a)(1)(D) excludes individuals from large areas of private employment solely because they are members of a minority political party which urges radical changes in our society. Such political discrimination is fundamentally at war with the First Amendment, which safeguards "the cherished freedom of association" from governmental infringement. *Elfbrandt v. Russell, supra*, at 18.

If infringement is permissible at all, it must have a compelling justification. This is true although the legislation is in the form of a disqualification rather than an outright prohibition. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions on a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404.

The government defends section 5(a)(1)(D) on the ground that Congress was justified in finding that some members of the Communist Party will commit espionage and sabotage in defense facilities if given the opportunity to do so. We have shown that this finding is groundless. But even if it were not, section 5(a)(1)(D) would be invalid under the familiar principle that a statute touching First Amendment rights "must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state'." *Elfbrandt v. Russell, supra,* at 18. Obviously, no such danger is presented by the employment in defense facilities of those members of the Communist Party who, as the government acknowledges (Br. 38), "would never consider committing either sabotage or espionage."

The government argues (Br. 40) that the blunderbuss scheme of section 5(a)(1)(D) is preferable to a narrowly drawn screening program because an absolute prohibition on defense plant employment, enforcible by criminal sanctions, "has an immediate *in terrorem* effect, and it requires no bulky administrative machinery to carry it into practice." But these considerations of convenience and efficiency which might be persuasive in other areas must yield to the social interest in the freedoms that the First Amendment guarantees. *N.A.A.C.P. v. Button,* 371 U.S. 415, 433, 438; *Shelton v. Tucker,* 364 U.S. 479, 488-89.

Thus, legislation punishing a bookseller for the bare possession of an obscene book cannot be sustained on the ground that a narrowly drawn statute requiring proof of scienter would be susceptible of easy evasion. *Smith v. California,* 361 U.S. 147. The state may not "burn the house to roast the pig" by proscribing the sale to anybody of books that tend to corrupt the morals of children. *Butler v. Michigan,* 352 U.S. 380, 383. It may not prohibit the distribution of anonymous leaflets the better to control false advertising and libel. *Talley v. California,* 362 U.S. 60. Nor may it bar the solicitation and subsidization of

litigation when engaged in as a form of political expression, although the same acts, in other contexts, may be prohibited as barratry. *N.A.A.C.P. v. Button, supra.*

Applying this principle, *De Jonge v. Oregon*, 299 U.S. 353, held that the assumption that the Communist Party advocates forcible overthrow, even if true, cannot justify a statute proscribing participation in its meetings for peaceable political action. Similarly, *Scales v. United States, supra,* sustained the membership clause of the Smith Act only because the Court believed that, as construed, the statute prohibited association with the Communist Party only when engaged in for the purpose of bringing about forcible overthrow. The Court stated (at 229):

> ". . . the membership clause, as here construed does not cut deeper into the freedom of association than is necessary to deal with 'the substantive evil that Congress has a right to prevent.' *Schenck v. United States*, 249 U.S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' *Noto v. United States*, post, p. 290. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute. . . ." (Bracketed matter in the original.)

Section 5 runs afoul of these decisions. It restrains the association of all members, irrespective of guilty knowledge, intent or organizational activity. Accordingly, "the member for whom the organization is a vehicle for the advancement of legitimate aims and policies" *does* "fall within the ban of the statute." Again, section 5 applies to members of the Communist Party notwithstanding that the latter has *not* "been shown to engage in illegal advocacy" or conduct. See *supra,* pp. 31–32 and cf. *Noto v. United States,* 367 U.S. 290. Moreover, the section bars the members from *all* jobs in defense facilities, includ-

ing those that are non-sensitive. See *supra*, p. 17. Obviously, then, it does "cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent'."

Section 5 is patently over-broad for the additional reason that its sanctions are not confined to persons who are members of the Communist Party in any realistic sense. The section applies to all persons found to be members under the indicia prescribed by section 5 of the Communist Control Act, 50 U.S.C. 844, and *Killian v. United States*, 368 U.S. 231. These require that in deciding whether a person charged with violating section 5 is a member of the Communist Party, the jury shall consider whether the accused ever: attended any type of Party gathering; conferred with other members "in behalf of any plan or enterprise" of the organization; "advised, counseled, or in any other way imparted information, suggestions or recommendations to [its] officers or members, or to anyone else in behalf of [its] objectives"; indicated in any way "a willingness to carry out in any manner and to any degree [its] plans, designs, objectives or purposes," or "in any other way participated in [its] activities, planning, actions, objectives, or purposes." These considerations permit a jury to apply section 5(a)(1)(D) to persons whose contacts with the Communist Party are both innocent and insignificant and who do not consider themselves to be members.

The impact of section 5 on First Amendment freedoms is magnified by the fact that the standards for determining whether an organization is a Communist-action organization and whether an accused individual is a member focus on views, policies and their expression. See *Communist Party v. S.A.C.B.*, *supra*, at 58-59, and *Killian v. United States*, *supra*.

The vice of section 5(a)(1)(D) is aggravated by what the government (Br. 40) rightly calls its "*in terrorem* effect" on Communists and non-Communists alike. "These [First

Amendment] freedoms are delicate and vulnerable, as well as extremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P. v. Button, supra,* at 433.

The "chilling effect" (*Dombrowski v. Pfister,* 380 U.S. 479, 487) of section 5(a)(1)(D) on the exercise of First Amendment rights was described by President Truman in his veto message, *supra* (p. 5):

> "And what kind of effect would these provisions have on the normal expression of political views? Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

The underlying premise of the government's brief (pp. 14, 29, 43) is that section 5(a)(1)(D) is justified under the war power, and (at 43) that nothing turns on the fact that we are not "technically 'at war' " with the Soviet Union. This thesis is not only fallacious as a matter of law but flouts national policy. As the President only recently declared:

> "Our compelling task is this: to search for every possible area of agreement that might conceivably enlarge, no matter how slightly or how slowly, the prospect for cooperation between the United States and the Soviet Union. In the benefits of such cooperation, the whole world would share and so, I think, would both nations." Remarks at the National Reactor Testing Site for Atomic Energy Commission at Idaho Falls, Idaho, Aug. 26, 1966, p. 3.

C. The construction of section 5(a)(1)(D) by the court below.

The District Court read the elements of guilty knowledge, intent and activity into section 5(a)(1)(D) in order to save it (R. 9). We agree with the government (Br. 50-52) that, as the court below itself recognized (R. 9), this interpretation of the statute flies in the face of *Aptheker*. As was said there of section 6 (at 515-16):

> "The clarity and preciseness of the provision in question makes it impossible to narrow its indiscriminately cast and over broad scope without substantial rewriting . . . This course would not be proper, or desirable, in dealing with a section that so severely curtails personal liberty."

Of course, if the section is found to be susceptible of the interpretation given it below, the judgment dismissing the indictment must nevertheless be affirmed for failure to charge an offense.

II.

The indictment is defective because it fails to allege that the Communist Party is a Communist-action organization.

A. Section 5(a)(1)(D) is applicable only to an organization which both is, and has registered or been ordered to register as, a Communist-action organization.

The indictment alleges that a final order is in effect requiring the Communist Party to register as a Communist-action organization. It does not allege that the Communist Party is, in fact, a Communist-action organization. The government omitted the latter allegation because, as it interprets section 5(a)(1)(D), the registration order is conclusive of the character of the Communist Party in prosecutions under that section. Government's Memorandum in Opposition to Motion to Dismiss, pp. 20-22.

In what follows, we show that the government's interpretation is erroneous in light of the text of the statute and constitutional considerations. Properly construed, section 5(a)(1)(D) makes it an element of the offense that the Communist Party *is* a Communist-action organization. The failure to allege that fact is therefore fatal to the indictment. *Russell v. United States*, 369 U.S. 749, and authorities there cited at 764-766; Rule 7(c), Federal Rules of Criminal Procedure. [18]

1. The text of the section.

Section 5 provides that "[w]hen *a Communist organization*, as defined in paragraph (5) of section 3 of this title,[19] is registered or there is in effect a final order of the Board requiring *such* organization to register," it becomes unlawful for the members of the organization to engage in specified conduct. Section 5(a)(1)(D) provides that "if *such* organization[20] *is* a Communist-action organization," it shall be unlawful for the members to hold jobs in defense facilities. It is apparent from the quoted text that a person can be guilty of violating section 5(a)(1)(D) only if two conditions are satisfied with respect to the organization of which he is a member. The organization (1) must be a Communist-action organization as defined in section 3(3), and (2) must have registered or have been ordered to register.

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[18] The District Court did not rely on this ground for dismissing the indictment. Since, however, the issue turns on the interpretation of the statute on which the indictment was founded, it is open for consideration on this appeal. *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92.

[19] Section 3(5) defines Communist organizations to include Communist-action and Communist-front organizations, thus incorporating by reference the section 3(3) and 3(4) definitions of these organizations.

[20] I.e., a Communist organization which has registered or is required by a final order to register.

Had Congress intended to make a final order requiring an organization to register as a Communist-action organization conclusive of its character for the purposes of section 5(a)(1)(D), it could easily have said so. Instead, Congress predicated criminal liability of a member not only on what the organization is found by the Board to be, but on what it "is," and thereby made the existence of the fact as well as of the finding an element of the offense.

An examination of criminal provisions of the Act shows that this result was deliberate. The only other provision imposing a disqualification for membership in Communist organizations is similarly worded, while others predicate criminal liability solely upon the fact that the organization has registered or has been finally ordered to do so.

Thus section 6(a) provides that, "[w]hen *a Communist organization* as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring *such* organization to register," it shall be unlawful for members of the organization to apply for or use passports. The quoted words are identical with the introductory words of section 5 and, like the latter, make proof that the organization is in fact a Communist organization prerequisite to the conviction of a member.

Section 6(b), however, is worded differently. It provides that "[w]hen *an organization* is registered, or there is in effect a final order of the Board requiring *an organization* to register, as a Communist-action organization," it shall be unlawful for a federal employee to issue a passport to a person whom he knows or believes to be a member. Thus, section 6(b), unlike 6(a) and 5(a)(1)(D), dispenses with proof of the actual character of the organization, and makes proof of the fact of its registration or the issuance of a final registration order sufficient. This is likewise the case with section 10, which punishes violation of the labelling requirements of the Act.[21] Again,

[21] The civil sanctions of section 11 (denial of tax deductions and exemptions) are similarly worded.

section 15(a), punishing the failure to register in obedience to a registration order, does not require proof of the character of the organization but only that it has been ordered to register.

It is apparent from the comparative wording of sections 5(a), 5(a)(1)(D) and 6(a), on the one hand, and sections 6(b), 10 and 15(a), on the other, that Congress was aware of the difference between requiring proof of the fact that an organization is of a specified character and proof of the fact that it has been found by an administrative agency to be of such character. Congress made the existence of both facts elements of the offense under section 5(a)(1)(D).[22] This conclusion, which follows from the text of the Act, is buttressed by the principle that criminal statutes are to be strictly construed. Cf. *Yates v. United States*, 354 U.S. 298, 310-11.

2. Constitutional considerations.

"The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable

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[22] Nothing in the legislative history illuminates Congress' reasons for doing so. The introductory clauses of sections 5(a) and 6(a), as they appear in the Act, were contained in the bill passed by the House. H.R. 9490, 81st Cong., 2d Sess. The House bill did not include any provision corresponding to section 6(b). The Senate adopted an amended version of the House bill in which the introductory clauses of sections 5(a) and 6(a) were identical with the introductory clause of section 6(b) as it appears in the Act. The Senate bill included section 6(b) in its present form. The conference report adopted without comment the House version of the introductory clauses of sections 5(a) and 6(a) and the Senate addition of section 6(b). It added section 5(a)(1)(D) which did not appear in either bill. H. Rep. No. 3112, 81st Cong., 2d Sess. (on H.R. 9490). The House and Senate Committee reports add nothing further. H. Rep. No. 2980, 81st Cong., 2d Sess. (on H.R. 9490); S. Rep. No. 1358, 81st Cong., 2d Sess. (on S. 2311).

alternative. . . . Judicial abstention is especially wholesome where we are considering a penal statute." *United States v. Five Gambling Devices*, 346 U.S. 441, 448-49. Accordingly, the Court has not infrequently strained the words of a statute in order to avoid a serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47.

. . . Here, the government's interpretation of section 5(a)(1)(D) raises serious constitutional questions. But these may be avoided simply by adhering to the plain text of the statute.

a. Procedural due process

The only constitutional justification that the government can advance (Br. 35-36) for subjecting members of the Communist Party to the sanctions of section 5(a)(1)(D) is that the organization has the characteristics of a Communist-action organization as defined in the Act. Nevertheless, as the government interprets the section and has drafted the indictment, the character of the Party is not litigable in the prosecution of appellee for violating the section. Instead, he is concluded on this issue by the order of the Board requiring the Party to register as a Communist-action organization.

Appellee was not a party to the proceeding in which this order was entered.[23] And the Act provides no procedure permitting appellee to challenge the Board's finding that the Party is a Communist-action organization unless he may do so in his prosecution for violating section 5. The government's interpretation of the section therefore denies appellee procedural due process since it subjects him to deprivation of liberty without according him a hearing at which he may contest the factual premise on which the validity of the deprivation depends. *United*

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[23] In accordance with section 13(a) of the Act, the proceeding was brought against the Communist Party alone. See *Communist Party v. S.A.C.B.*, *supra*, at 19.

States v. Carolene Products Co., 304 U.S. 144, 152; *Noto v. United States*, 367 U.S. 290, 299; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-174, 175-179 (concurring opinions); *Renaud v. Abbott*, 116 U.S. 277, 288. Cf. *Kirby v. United States*, 174 U.S. 47.

The due process defect inherent in the government's interpretation of section 5 is aggravated by the fact that the Board's determination that the Communist Party is a Communist-action organization was made in 1953,[24] ten years before the indictment of appellee. In this changing world, a conclusive presumption that a state of facts, once found to exist, will continue in perpetuity is plainly arbitrary. It is therefore a principle of due process that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co., supra*, at 153; *Chastleton Corporation v. Sinclair*, 264 U.S. 543; *Baker v. Carr*, 369 U.S. 186, 214.

The rule of these decisions has peculiar pertinence to factual findings which, like the Board's, involve an evaluation of social and political ideas and phenomena. Moreover, as the Chief Justice observed in his dissent in *Communist Party v. S.A.C.B., supra*, at 134, n. 11, the Board's 1953 finding was itself based on a presumption of continuity which "is certainly dubious" as applied to "stale evidence" of Party activity prior to 1940.[25] And only recently the Court remanded a proceeding under the Act to the Board because evidence taken in 1955 was held to be too stale to support a Board finding made five years later that the organization proceeded against was a Communist-front organization. *American Committee for Protection of Foreign Born v. S.A.C.B.*, 380 U.S. 503. See

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[24] See *Communist Party v. S.A.C.B., supra*, at 19-20.

[25] The majority (at 69) declined to pass on the sufficiency of this evidence.

also, *Veterans of the Abraham Lincoln Brigade v. S.A.C.B.*, 380 U.S. 513.

Accordingly, even if it could be argued that appellee, if found by a jury to be a member of the Communist Party, will be bound by the Board's 1953 determination against the organization, due process would still entitle him to a hearing on the Party's *current* character. The government's interpretation of section 5 denies him such a hearing.

Nor can it be argued that appellee is afforded due process by section 13(b) and (i) of the Act. The section permits an organization which has registered as a Communist-action organization to apply for a cancellation of its registration and to secure relief on showing that it is no longer a Communist-action organization. This provision is plainly inadequate to protect persons subject to the deprivations of section 5, since it does not permit a member, let alone an individual like appellee who is merely suspected or accused of membership, to seek a redetermination of the organization's status.

Moreover, since proceedings under section 13(b) and (i) are open only to registered organizations, they are not available to the Communist Party. For the Party has not registered in compliance with the 1953 order of the Board but is still litigating the contentions, held premature in *Communist Party v. S.A.C.B., supra*, that it cannot constitutionally be required to do so. See *supra*, n. 5. Obviously, appellee's constitutional rights may not be infringed because the Communist Party has elected to assert its own.

b. Indictment, trial by jury, and proof beyond a reasonable doubt.

The government's defense of the constitutionality of section 5(a)(1)(D) rests on the premise that the Communist Party has the characteristics which the Act ascribes to a Communist-action organization. Yet, under the gov-

ernment's interpretation, the issue as to the character of the Party is withdrawn from the grand jury that returns the indictment and from the judge and petit jury who try it. Determination of the issue is committed to the Board, an administrative agency. The agency, moreover, bases its determination on a preponderance of the evidence and not on proof beyond a reasonable doubt.[26] So interpreted, section 5(a)(1)(D) violates the constitutional guarantees of indictment by grand jury, trial by jury, and due process. *Wong Wing v. United States*, 163 U.S. 228; *United States v. Spector*, 343 U.S. 169, 174-180 (dissenting opinion); *Aptheker v. Secretary of State, supra*, at 518 (concurring opinion of Justice Black); *Maggio v. Zeitz*, 333 U.S. 56, 78-79 (opinion of Justice Black); *United States v. England*, 347 F.2d 425; Fraenkel, Can the Administrative Process Evade the Sixth Amendment? 1 Syracuse L. Rev. 173. Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144.

Wong Wing invalidated a statute for the imprisonment of Chinese aliens who were found by a United States commissioner to be in the country unlawfully. The Court held that the statute violated the Fifth and Sixth Amendments by authorizing punishment without indictment by grand jury and trial by judge and jury. It recognized that aliens could be deported on administrative determinations of their illegal presence, but it decided that they could not be punished for the same cause without observance of the constitutional safeguards governing criminal cases.

The Act differs from the statute in *Wong Wing* in that it accords appellee the constitutional safeguards with respect to one element of the offense, membership in the Communist Party. But it denies these safeguards with respect to the other major element, the character of the Party. The principle of *Wong Wing*, however, and the plain meaning of the Constitution makes the safeguards applicable to *every* element of the offense. The result in

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[26] See section 14(a) of the Act.

Wong Wing would have been the same if the statute had provided for an administrative determination of the illegality of the alien's entry and had accorded him a jury trial limited to the issue of his presence in the country.

This was virtually the situation in *United States v. Spector*, 343 U.S. 169. There the statute punished aliens under administrative deportation orders for failing to depart the country or to take steps to effect their departure. Under the statute, therefore, the issue of the deportability of the accused was determined administratively and not at the criminal trial. The majority of the Court did not consider whether this fact invalidated the statute, holding (at 172-173), that the question had not been raised and hence that decision on it should be reserved.

Justice Jackson, joined by Justice Frankfurter, in an opinion with which Justice Black expressed agreement,[27] dissented on the ground that the question was properly before the Court and that the statute unconstitutionally denied the accused a judicial and jury trial on the issue of his deportability. After reviewing the decision in *Wong Wing*, the opinion proceeds (at 177-78):

> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court . . . If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a

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[27] Justice Black wrote a separate opinion dissenting on other grounds, but stated (at 174, n. 1) that, "I have not seen a satisfactory reason for rejecting [Justice Jackson's] view," and cited his own separate opinion in *Maggio v. Zeitz*, *supra*, at 78-79. He there held that a finding by a referree in bankruptcy in a turn-over order that an officer of the bankrupt was in possession of its merchandise could not constitutionally substitute for proof of such possession beyond a reasonable doubt in contempt proceedings against the officer for disobedience of the order.

> crime can be established in the same manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

As interpreted by the government, section 5(a)(1)(D), like the self-deportation statute, subdivides the crime it creates by submitting "the vital and controversial part" — the nature of the organization — to conclusive administrative determination. If this procedure were permissible, Congress could likewise enact a statute making a determination of the Internal Revenue Service that a taxpayer had received taxable income conclusive of that fact in a prosecution for his failure to report the income in his return The government's contention that the revenue laws should be so interpreted was rejected in *United States v. England, supra,* at 438-443, in reliance on Justice Jackson's reasoning in *Spector*. The government's interpretation of section 5(a)(1)(D) must be rejected on the same ground.

The majority in *Spector* (at 172-173), in stating that it was not foreclosing subsequent consideration of the question dealt with by Justice Jackson, noted, "cf. *Yakus v. United States,* 321 U.S. 414; *Cox v. United States,* 332 U.S. 442." Neither decision is contrary to the views expressed by Justice Jackson.

Yakus sustained a wartime statute imposing criminal penalties for violations of maximum price regulations of the Office of Price Administration. The statute foreclosed defendants from challenging the regulations in criminal prosecutions by providing that the validity of the regulations could be contested only in administrative proceedings subject to judicial review.[28]

The price regulations dealt with in *Yakus* were

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[28] But see the dissenting opinion of Justice Rutledge, at 478-489.

instances of administrative rule-making — the promulgation of rules of general application for the regulation of future conduct. The decision is applicable only to the rule-making function of administrative agencies, not to administrative adjudication.

In promulgating rules or regulations, an administrative agency performs a legislative function. *Assigned Car Cases*, 274 U.S. 564, 583. Congress might itself prescribe the rule by detailed legislation. But it may choose instead to leave the details for determination by an administrative agency. Since, in the latter case, the power exercised by the agency is legislative, it is not subject to constitutional limitations on the exercise of judicial power. Accordingly, the validity of rules prescribed by the agency is not a matter for determination by the grand jury that returns an indictment for their violation or the petit jury that tries the case. Nor is their validity subject to the requirement of proof beyond a reasonable doubt.

The situation is different under the statutes involved here and in *Spector*, where the administrative agencies issued adjudicative orders determining that a specific individual or organization had engaged in proscribed conduct. This is a quasi-judicial function which Congress itself may not perform and which it may delegate to the Executive only to the extent that it does not infringe on the judicial function or the procedures prescribed by the Constitution for the determination of guilt in criminal cases. Justice Jackson pointed out this distinction in *Spector*, at 179.[29] Cf. *United States v. Brown*, 381 U.S. 437, 442-446, 449-450.

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[29] Justice Jackson, as well as Justices Frankfurter and Black who agreed with his views in *Spector*, were members of the majority that decided *Yakus*. That the latter was confined to cases of administrative rule-making appears from its emphasis (at 444) on the fact that the case involved violations of "an administrative regulation."

Cox v. United States, supra, held that a draftee accused of refusing to report for service in violation of the Selective Service Act is not entitled to a jury trial on the issue of his classification but is bound by the administrative denial of an exempt status unless the latter is invalid as a matter of law.[30]

Selective Service Act cases are *sui generis*. Congress, in the exercise of the war power, may require military service of all. An exemption is an act of grace and may be granted on such conditions as Congress chooses to exact. *Hamilton v. Regents,* 293 U.S. 245, 266-267 (concurring opinion). Congress therefore has complete discretion to authorize such classification of registrants as it sees fit. *Falbo v. United States,* 320 U.S. 549, 553-554. It is for this reason that the Court, while frequently divided on questions involving classifications and procedures under the Selective Service Act, has not treated them as having a constitutional dimension or as presenting more than an issue of statutory construction. See, e.g. *Estep v. United States,*[31] and *Falbo v. United States,* both *supra; Dickinson v. United States,* 346 U.S. 389; *United States v. Nugent,* 346 U.S. 1; *Gonzales v. United States,* 364 U.S. 59. For the same reason, the Court has approved procedural shortcuts in Selective Service Act cases that are not countenanced in other contexts. Cf. *Estep v. United States, supra,* and *Eagles v. Samuels,* 329 U.S. 304, with *Ng Fung Ho v. White,* 259 U.S. 276, and *Jacobellis v. Ohio,* 378 U.S. 184, 190; *United States v. Nugent, supra,* with *Greene v. McElroy, supra.*

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[30] I.e., because it was made in violation of the statute or regulations or lacked any basis in fact. See *Estep v. United States,* 327 U.S. 114, 122.

[31] Justices Murphy (at 125) and Rutledge (at 132) agreed with the prevailing opinion's construction of the statute but added that this was also required by constitutional considerations. None of the other six Justices who participated (three of whom wrote opinions) saw any constitutional question in the case.

The decision in *Cox* denying the accused a jury trial on the issue of his classification rested upon and was required by the prior holding in *Estep v. United States, supra,* that the defendant in a prosecution for draft evasion may attack his classification only on the ground that it is invalid as a matter of law. See *Cox,* at 452-453. As noted above, the Court saw no issue of constitutionality in *Estep.* One sentence of the majority opinion in *Cox,* however, touches upon the constitutional question by way of dictum: It states (at 453):

> "The concept of a jury passing independently upon an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have the jury pass on the validity of an administrative order."

The only authority cited for these generalizations, *Yakus v. United States, supra,* does not support them. For *Yakus* involved an administrative *regulation,* not an administrative *adjudication,* and applies, as we have seen, only to rule-making.

The self-deportation statute considered in *Spector* differs from the Selective Service Act in decisive respects. It involves none of the exigencies presented by an exercise of the war power in raising an army. It is not a matter of grace that non-citizens who are lawful residents of this country are exempt from the duty of self-deportation which the statute exacts. On the contrary, the duty may constitutionally be imposed only on non-citizens whose presence here is unlawful. Hence, an administrative finding of the facts which are prerequisite to the constitutional application of the statute cannot conclude an accused in a prosecution for its violation. It was doubtless because these distinctions appeared self-evident that Justices Jackson and Frankfurter, who voted with the majority in *Cox,* and Justice Black who agreed (at 455) that Cox was not enti-

tled to a jury trial on the issue of his classification, did not think it apposite to refer to that case in *Spector*.[32]

The present case is on all fours with *Spector*. For section 5(a)(1)(D) is unconstitutional as applied to appellee unless, at least, the Communist Party is in fact a Communist-action organization. Hence appellee may not be concluded in a criminal prosecution for violating the section by an administrative determination of this issue of constitutional fact.

c. Attainder

Communist Party v. S.A.C.B., supra, held (at 82-88) that the Act is not a bill of attainder as applied to the Communist Party. We believe that conclusion erroneous for the reasons stated in Justice Black's dissenting opinion (at 146-147). Be that as it may, section 5(a)(1)(D), as interpreted by the government, attaints the members of the organization under the reasoning of the majority in the *Communist Party* case and under *United States v. Brown, supra.*

(1) "A bill of attainder is a legislative Act which inflicts punishment without judicial trial." *Cummings v. Missouri,* 4 Wall. 277, 323. The *Communist Party* case, abstracting the registration requirement of section 7 from its setting in the Act and viewing it in isolation, held (at 56) that it "is a regulatory, not a prohibitory statute." On this view, the registration requirement is not a bill of attainder because it does not inflict punishment.

Section 5(a)(1)(D), on the other hand, imposes criminal liability on members of the Communist Party who hold

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[32] And see Justice Jackson's dissent in *Dickinson v. United States, supra,* at 400, written two years after *Spector,* in which he expressed the view that all factual questions relating to the classification of a draftee are "to be left wholly to the [draft] board" and that "its decision is final" in a prosecution for draft evasion.

employment in defense facilities. Obviously, it inflicts punishment on such members. *United States v. Brown, supra,* at 456-460.

The remaining question, therefore, is whether section 5(a)(1)(D) denies a judicial trial. As interpreted by the government, the section clearly does so. For under that interpretation, the determination on which the infliction of punishment depends — that the Communist Party is a Communist-action organization — is made by the Board and not by a court.

United States v. Brown, supra, invalidated a statute making it a crime for a member of the Communist Party to hold office in a labor organization. The Court held (at 461) that if Congress wishes to "weed dangerous persons out of the labor movement" or forbid subversives from holding sensitive employment, it "must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied."

The present case would be identical with *Brown* if Congress, having determined the Communist Party to be a Communist-action organization, had identified it by name in section 5(a)(1)(D). But the prohibition against bills of attainder is likewise infringed if Congress has delegated the power to make this determination to the executive branch of the government.[33] For appellee would still be denied the *judicial* trial which is prerequisite to the infliction of punishment. Cf. *Joint Anti-Fascist Refugee*

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[33] In fact, an essential part of the determination that the Communist Party was a Communist-action organization was made by Congress itself. For the Board was bound, in the proceeding against the Party, by the Congressional findings of section 2 of the Act that there existed a world-Communist movement controlled by the Soviet Union and having other specified characteristics. *Communist Party v. S.A.C.B., supra,* at 112. See, *infra,* pp. 58-59.

Committee v. McGrath, supra, at 144 (concurring opinion).[34]

(2) *Communist Party v. S.A.C.B., supra,* at 86-87, recognized that the Act's registration requirement would impose punishment upon and therefore attaint the Communist Party if the organization could not escape the consequences of a final registration order by ceasing to engage in the conduct on which the Board predicated the order. The Court believed that a proceeding under section 13(b) afforded the Party the required escape, stating (at 87):

> "In this proceeding the Board has found, and the Court of Appeals has sustained its conclusion, that the Communist Party, by virtue of the activities in which it now engages, comes within the terms of the Act. If the Party should choose at any time to abandon these activities, *after it is once registered pursuant to § 7,* the Act provides adequate means of relief . . . §§ 13(b), (i), (j), 14(a). Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn on continuously contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a described character." (Emphasis supplied.)

What the Court overlooked in the quoted passage was that litigation of the Party's constitutional objections to the registration requirement, which the opinion elsewhere dismissed as premature, might be prolonged and could

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[34] Section 5(a)(1)(D) is a bill of attainder even if interpreted in accordance with its text. So interpreted, an accused receives a judicial trial with respect to the character of the organization in which he is alleged to hold membership. But he receives no trial at all with respect to those personal characteristics (knowledge, intent and activity) whose presence can alone justify his punishment. These characteristics have been imputed to him by Congress solely because of the possibly irrelevant fact of his membership. See *supra*, pp. 16-17. In this sense, it is Congress which inflicts the punishment. See *United States v. Brown, supra,* at 455-456.

eventuate in a decision that the registration order may not be enforced. Since a section 13(b) proceeding is available only to *registered* organizations, it does not provide "adequate means of relief" to the Party, at least so long as the latter's constitutional challenge remains in litigation. See, *supra*, p. 44. Nor, paradoxically, will such a proceeding ever do so if the Party is successful. It was therefore erroneous, on the Court's own premise, to conclude that sections 13(b), (i), (j) and 14(a) save the registration requirement from condemnation as a bill of attainder with respect to the Party.

Furthermore, whatever may be the case with respect to it, appellee cannot under any circumstances secure reconsideration of the Party's status if the government's interpretation of section 5(a)(1)(D) is accepted. See *supra* p. 44. That interpretation leaves him with no possible escape from the effect of the Board's 1953 determination.

Unlike the statute invalidated in *United States v. Brown*, *supra*, the Act does not identify the Communist Party, by name, as a Communist-action organization. But now that the identification has been made by the Board and affirmed, the situation of appellee is as though the Party had been named in the Act. For the sanctions of section 5(a)(1)(D) attach, not to membership in an organization having described characteristics, but to membership in a specified organization — the Communist Party — whether it currently fits the statutory description or not. Accordingly, in this respect also, section 5(a)(1)(D), as interpreted by the government, is invalid under the rule of *Brown*.

It cannot be urged that the government's interpretation of section 5(a)(1)(D) should prevail because of the impracticality of permitting relitigation of the status of the Communist Party in each prosecution under the section. It is only in "rare and unusual circumstances" that the literal meaning of a statute will be disregarded, even when it seems to lead to an absurd result. *Crooks v. Harrelson*, 282 U.S. 55, 60. There is nothing absurd about a literal

interpretation of 5(a)(1)(D). And it is no more impractical to require proof of the character of the Communist Party in each prosecution under that section than to require similar proof in each prosecution under the membership clause of the Smith Act. See *Scales v. United States*, 367 U.S. 203 and *Noto v. United States*, 267 U.S. 290. As the latter stated (at 299):

> "The kind of evidence which we found in *Scales* sufficient to support the jury's verdict of present illegal Party advocacy is lacking here in any adequately substantial degree. It need hardly be said that it is on the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party."

Cf. also, *Fiske v. Kansas*, 274 U.S. 380, with *Burns v. United States*, 274 U.S. 328.

B. If the government's interpretation of section 5(a)(1)(D) is accepted, the section is unconstitutional.

If the government has correctly interpreted section 5 (a)(1)(D), and if the indictment therefore charges an offense, then the section is unconstitutional for the reasons stated *supra*, pp. 42-55.

III.

Section 5(a)(1)(D) denies procedural due process because it makes designations of defense facilities by the Secretary of Defense conclusive upon persons adversely affected without affording them an opportunity for a hearing or judicial review.

Section 3(7) broadly defines "facilities" so as to include any place of employment and "any part, division or department" thereof. The authority of the Secretary of Defense to designate a facility as a defense facility is similarly broad. He is "authorized and directed" by section 5(b) to

do so upon finding that "the security of the United States requires" the application to the facility of the employment sanctions of section 5(a).

The authority of the Secretary to designate defense facilities empowers him to terminate the employment of some members of the Communist Party and to blacklist all members. Yet the Act provides no procedure permitting persons affected by his designation to contest its validity. There is no provision for an administrative hearing either before or after the designation is made, and, to appellee's knowledge, none was held in the present case. Nor is there any provision for judicial review. Instead, the action of the Secretary under section 5(b) concludes "any person subject thereto or affected thereby" simply upon the posting in the facility of notices of his designation.

The Act thereby violates the "rudimentary requirements of fair play" that persons may not be deprived of liberty or property by administrative action without according them a reasonable opportunity to be heard and present evidence in opposition. *Morgan v. United States*, 304 U.S. 1, 14-15. To the same effect: *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-74, 175-79 (concurring opinions); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598, 599; *Yakus v. United States*, 321 U.S. 414, 433, 446. Cf. *Armstrong v. Manzo*, 380 U.S. 545, 550.

Since the designation by the Secretary of a defense facility prescribes a rule of general application (i.e. to all persons who are or may become members of Communist organizations) for regulating future conduct, it is an instance of administrative rule-making and not adjudication. Accordingly, the principle of Justice Jackson's opinion in *Spector* is inapplicable. See *supra*, pp. 47-48. But the due process requirement of a hearing applies to administrative rule-making as well as adjudication. Both

the *Morgan* and *Yakus* cases, for example, involved rule-making.[35]

The Act's violation of procedural due process is the more flagrant since the factual accuracy of the Secretary's determination is constitutionally prerequisite to the application of the sanctions of section 5. Cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 152. Furthermore, the requirement of a hearing assumes peculiar importance here because of the vagueness of the statutory standard and the nature of the issue confided to the Secretary's discretion. "An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point . . .' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe." *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 170-71 (concurring opinion of Justice Frankfurter, ftn. omitted).

The Act cannot be interpreted as providing for review of the Secretary's designation in criminal prosecutions for violations of section 5(a)(1)(D). For the language and structure of the Act compel the conclusion that Congress intended the Secretary's determination to be conclusive. Moreover, such an interpretation would require the Court to write an entirely new statute, specifying such procedural matters as whether review is to be by the judge or

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[35] The incidents of a due process hearing for rule-making may differ in some respects from those required for adjudication. See Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193.

the jury in the criminal proceeding; who has the burden of proof; the quantum of evidence needed to satisfy it, and whether the Secretary may be required to disclose classified information on which his determination was based. Cf. *Aptheker v. Secretary of State, supra,* at 515-16.

Finally, section 5 would not be saved by such an interpretation, even if permissible. For persons deprived of their liberty and property by the Secretary's designation may not be required to undergo criminal prosecution as the price of securing a hearing on its validity. Due process requires that they be afforded a hearing before the designation takes effect. *Ewing v. Mytinger & Casselberry, supra,* at 598, and cases there cited; *Yakus v. United States, supra,* at 437-39.

IV.

Section 5(a)(1)(D), as applied, is unconstitutional because the order of the Board requiring the Communist Party to register as a Communist-action organization has been invalidated by facts susceptible of judicial notice establishing that the world Communist movement described in section 2 of the Act does not exist.

The government's defense of the constitutionality of section 5(a)(1)(D) rests on the premise that a member of an organization having the characteristics of a Communist-action organization is a security risk. Even assuming the validity of that premise, the section cannot be constitutionally applied to members of the Communist Party unless the latter is a Communist-action organization within the meaning of the Act.

Section 3(3) of the Act defines a Communist-action organization as one which is controlled by the foreign government controlling the world Communist movement referred to in section 2 and which operates to advance the objectives of such movement. Hence there cannot be a Communist-action organization unless there exists a world Communist movement as described in section 2.

Section 2 finds that there exists a world Communist movement, under the direction and control of the Communist dictatorship of an unnamed foreign country, and made up of Communist-action organizations which are national sections of a world-wide Communist organization and which are subject to the direction, control and discipline of the unnamed foreign dictatorship. The Board, in the Report accompanying its 1953 registration order against the Communist Party, found that the unnamed foreign country referred to in section 2 was the Soviet Union. See *Communist Party v. S.A.C.B., supra,* at 112.

In affirming the order of the Board, this Court said of the section 2 findings concerning the world Communist movement (*ibid.*):

> "The characteristics of the movement and the source of its control are not to be established by the Attorney General in proceedings before the Board, nor may they be disproved. But this is because they are merely defining terms whose truth, as such, is irrelevant to the issue in such proceedings. They are referrents which identify *'the* foreign government' to which § 3(3) adverts. The Board, construing the statute, concluded that that foreign government was the Soviet Union. We affirm that construction."

The Court recognized, however, that changed circumstances would require a change in this construction of section 2. It stated (at 113):

> "If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which § 2(1) and (4), fairly read in their context, refer - so that substantial domination by the Soviet Union would not bring an organization within the terms of § 3(3) - that, too, will be a matter of statutory construction which no 'findings' in the statute foreclose. The Board or a reviewing court will be able to say that the 'world Communist movement,' as Congress meant the term in 1950 (and whether or not there really existed, in 1950, a movement having all the characteristics described in § 2), no longer exists, or that Country X or Y, not the Soviet Union, now directs it."

The eventuality hypothesized by the Court when the world Communist movement as described in section 2 "no longer exists" has materialized. Whatever might have been the prevailing view concerning the findings of section 2 when Congress made them in 1950, their description of the world Communist movement is plainly anachronistic today. Statesmen and scholars alike recognize that the picture of Communism as a monolithic world movement, under iron Soviet discipline and control, and dedicated to the overthrow of all free governments by criminal and conspiratorial means, bears no resemblance to contemporary reality.

George F. Kennan has summarized the currest Western view as follows (Polycentrism and Western Policy, Foreign Affairs, Jan. 1964, p. 172):

> "Much of the discussion in Western countries today of the problem of relations with world Communism centers around the recent disintegration of that extreme concentration of power in Moscow which characterized the Communist bloc in the immediate aftermath of the Second World War, and the emergence in its place of a plurality of independent or partially independent centers of political authority within the bloc; the growth, in other words, of what has come to be described as 'polycentrism.' There is widespread recognition that this process represents a fundamental change in the nature of world Communism as a political force on the world scene; and there is an instinctive awareness throughout Western opinion that no change of this order could fail to have important connotations for Western policy."

Elsewhere in the same article, the author writes (p. 174):

> "Communism has now come to embrace so wide a spectrum of requirements and compulsions on the part of the respective parties and regimes that any determined attempt to re-impose unity on the movement would merely cause it to break violently apart at one point or another."

Senator Fulbright devoted a Senate speech entitled "Foreign Policy - Old Myths and New Realities" to the same subject (110 Cong. Rec. 6227), in the course of which he said (p. 6228):

> "The master myth of the cold war is that the Communist bloc is a monolith composed of governments which are not really governments at all but organized conspiracies, divided among themselves perhaps in certain matters of tactics, but all equally resolute and implacable in their determination to destroy the free world."

In similar vein, Vice President (then Senator) Humphrey, in an article for the North American Newspaper Alliance, has written that, "The 'monolithic unity' of the Communist bloc is an archaic myth to which no one even bothers to pay lip service any more." Washington Evening Star, Sept. 3, 1964. And Secretary of State Rusk, speaking before the IUE-AFL-CIO, declared that, "The Communist world is no longer a single flock of sheep blindly following behind one leader." Congressional Quarterly, March 6, 1964, p. 479. More recently, he said in an address to the New York Council on Foreign Relations (N.Y. Times, May 25, 1966):

> "Significant changes have occurred within the Communist world. It has long ceased to be monolithic, and evolutionary influences are visible in most of the Communist States."[36]

The political realities portrayed in these statements are matters of common knowledge and proper subjects for official or judicial notice. Yet, for the reasons examined earlier (*supra*, p. 44), the Act affords appellee no means of securing Board consideration of the fact that, in the words of *Communist Party v. S.A.C.B.*, *supra*, at 113, "'the world Communist movement,' as Congress meant the term in 1950 . . . no longer exists," and hence

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[36] Likewise, Arnold J. Toynbee has written that "the monolithic solidarity of world Communism is an exploded myth." We Must Woo Red China, Saturday Evening Post, July 17, 1965, p. 10.

that the registration order predicated on the existence of such a movement has been invalidated.

Nor would acceptance of appellee's position that section 5(a)(1)(D) requires proof in a criminal prosecution that the Communist Party is a Communist-action organization result in making the characteristics and control of the world Communist movement triable issues of fact in the criminal proceeding. For *Communist Party v. S.A.C.B.* held (at 112) that, "The characteristics of the [world Communist] movement and the source of its control are not to be established by the Attorney General . . . nor may they be disproved." Instead, the Court held (at 113) that these are questions of statutory construction. Hence they can be resolved only on the basis of judicial notice.

If this reading of *Communist Party v. S.A.C.B.* is accepted, it is incumbent on the Court "to say that the 'world Communist movement,' as Congress meant the term in 1950 . . . no longer exists" and therefore that section 5(a)(1)(D) cannot constitutionally be applied to appellee. On the other hand, if the findings of section 2 are conclusive even though patently anachronistic, then section 5(a)(1)(D), as applied, is unconstitutional on two grounds. First, it violates the due process principle that "the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153. Second, the Act is a bill of attainder because it does not "turn upon continuingly contemporaneous fact." *Communist Party v. S.A.C.B., supra*, at 87. See *supra*, pp. 43-44, 53-54.

CONCLUSION

The judgment below dismissing the indictment should be affirmed.

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